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**In the
Supreme Court of the United States**

October Term, 1989

MICHAEL OWEN PERRY

Petitioner,

vs.

STATE OF LOUISIANA

Respondent.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF LOUISIANA**

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Is a mentally ill death row inmate competent to be executed if, because of treatment with prescribed medication, he is aware of his impending execution and the reason for it?
2. May a state administer prescribed medication to a mentally ill death row inmate without his consent in order to achieve and maintain his competency to be executed?
3. If competency to be executed may be achieved and maintained with nonconsensual medication, what, if any, procedures are required prior to such medication by the Due Process Clause of the Fourteenth Amendment?

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT
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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This criminal case is before the Court on a writ of certiorari to the Louisiana Supreme Court for review of state post-conviction competency proceedings. Petitioner, Michael Owen Perry, is a Louisiana death row inmate who has a history of mental illness. At the suggestion of the Louisiana Supreme Court in its opinion affirming Perry's conviction and sentence, the state district court initiated proceedings to determine Perry's competence to be executed. Following appointment of a sanity commission and several evidentiary hearings, the district court found Perry competent to be executed and authorized prison officials to medicate Perry without his consent in order to maintain his competence. The Louisiana

Supreme Court denied review of the district court's ruling, and this Court granted Perry's petition for writ of certiorari.

Background

The evidence underlying Perry's conviction and sentence of death is summarized by the Louisiana Supreme Court in its opinion on appeal, *State v. Perry*, 502 So.2d 543 (La. 1986), which is reproduced in the Joint Appendix. (J.A. 1-44). Briefly, the facts are as follows. On a Sunday morning in the summer of 1983, Perry entered the home of his cousins, Randy Perry and Bryan LeBlanc, and killed them as they slept. (J.A. 3, 41). He then walked the short distance to his parents' home and broke into the house. (J.A. 3-4). When his parents, Chester and Grace Perry, arrived home from an out-of-town trip with their two-year-old grandson, Anthony Bonin, Perry was waiting for them. *Id.* He immediately shot and killed his parents and the child. (J.A. 4). Following the murders, Perry stole money belonging to his parents and fled in his parents' car to Washington, D.C., where he was arrested two weeks later. (J.A. 4-6).

Prior to Perry's trial for the murders of his family, the trial court conducted an inquiry into Perry's mental capacity to proceed. (J.A. 7). The court appointed a sanity commission composed of Drs. Louis E. Shirley, Jr., and Young Hee Kang, both general practitioners with limited experience in psychiatry. *Id.* The physicians examined Perry but did not render an opinion as to his competence to proceed to trial. *Id.* On recommendation of the commission, Perry was committed to the Feliciana Forensic Facility for evaluation and treatment. *Id.* During his stay at the institution, Perry was diagnosed as schizoaffective and was treated with Haldol, a neuroleptic medication.¹ (R. 511, 519-20, 534, 593).²

¹Neuroleptic, or antipsychotic, drugs are used to control the symptoms of psychotic illnesses such as schizoaffective disorder. Gutheil & Appelbaum, "Mind Control," "Synthetic Sanity," "Artificial Competence" and "Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication," 12 Hofstra L. Rev. 77, 79 (1983). Antipsychotics constitute a subclass of the psychotropic family of medication which includes all drugs which affect mental activity. *Id.*

²With the exception of medical records introduced as exhibits, all portions of the record which are referred to in this Brief and which are not contained in the Joint Appendix are reproduced in Appendix A.

After Perry was released from the Feliciana facility, a second sanity commission was appointed to evaluate his mental capacity. (J.A. 7). Drs. Shirley and Kang were again appointed to the commission along with Dr. Aretta J. Rathmell, a practicing psychiatrist. *Id.* This time, after examining Perry, the commission was unanimous in its opinion that Perry was competent to stand trial. *Id.* The district court agreed. (J.A. 8). Consequently, Perry proceeded to trial.

At trial, Perry was found guilty as charged of five counts of first degree murder. (J.A. 1). During the penalty phase of the trial, defense counsel urged the jury to consider Perry's mental condition as a mitigating factor in sentencing. (J.A. 38). The jury nevertheless recommended that Perry be sentenced to death on each of the five counts. (J.A. 1). The jury based its recommendation on its finding of two aggravating circumstances: Perry knowingly created a risk of death or great bodily harm to more than one person, and the murders were committed in an especially heinous, atrocious or cruel manner. (J.A. 1-2). In accordance with the recommendation of the jury, Perry was sentenced to death. (J.A. 2).

On appeal to the Louisiana Supreme Court, Perry's conviction and sentence were affirmed. (J.A. 3). In reviewing the conviction, the state's high court found, among other things, that the "weight of the evidence supports the trial court's determination of competency." (J.A. 11). With regard to Perry's sentence, the court affirmed the jury's rejection of Perry's mental condition as a mitigating circumstance:

Defense counsel argues the mitigating circumstances were apparently overlooked by the jury. We find the conflicting medical testimony on defendant's mental condition was provided to the jury and the jurors chose to believe the State's experts, that the defendant did not suffer from a mental disorder so overwhelming that he was insane or unable to control or understand his actions.

(J.A. 38). In addition, the court held that the death penalty "is proportionate to the offenses and to this particular defendant." (J.A. 41).

In concluding its opinion, the state Supreme Court offered the following guidance on the issue of post-conviction incompetence:

The State will not impose the death penalty on Michael Owen Perry if a court determines he has become insane subsequent to his conviction for first degree murder and lacks the capacity to understand the death penalty. . . . Defendant's burden is to show by a preponderance of evidence that he lacks the present capacity to undergo execution. . . . We have determined the defendant was capable of proceeding at trial. A similar review might be in order prior to execution.

(J.A. 43-4). This Court denied Perry's petition for writ of certiorari to review the decision of the Louisiana Supreme Court. *Perry v. Louisiana*, ___ U.S. ___, 108 S.Ct. 205 (1987), *reh'g denied*, ___ U.S. ___, 108 S.Ct. 511 (1987).

Post-Conviction Competency Proceedings

Following the suggestion of the Louisiana Supreme Court, the state district court initiated proceedings to determine Perry's competence for execution. (J.A. 45-6). In accordance with the state procedure for determining pre-trial competence to proceed, *see* La. C.Cr.P. arts. 642-649.1 (reproduced in Appendix B), the court appointed a sanity commission to evaluate Perry's mental capacity. (J.A. 45-46). The commission was composed of two psychiatrists: Dr. Theresita Jimenez, Perry's treating physician during his pre-trial confinement at the Feliciana Forensic Facility as well as the State's expert in the penalty phase of the trial, and Dr. Aris Cox, Perry's treating psychiatrist on death row. (R. 509, 546; J.A. 10, 45).

Perry, represented by counsel, moved for the appointment of a psychologist to the sanity commission. (J.A. 46). The court granted the motion, allowing Perry and respondent, the State of Louisiana, the opportunity to recommend psychologists for appointment to the commission. *Id.* Perry's counsel recommended appointment of psychiatrist Dr. Glen Estes and psychologist Dr. Curtis Vincent. (R. 19). Dr. Vincent had examined Perry in 1983 when Dr. Vincent was a clinical psychologist at the Feliciana Forensic Facility. (R. 587, 593). Dr. Estes had not previously treated or evaluated Perry. (R. 649). Accepting Perry's recommendations, the court appointed Dr. Estes and Dr. Vincent to serve on the sanity commission along with Drs. Jimenez and Cox. (J.A. 46).

After its appointment of the sanity commission, the court

granted an *ex parte* motion filed by Keith B. Nordyke, one of Perry's lawyers, for delegation of decision-making authority and appointment as "Do-Goooder" for Perry. (R. 186-88; J.A. 47). The court appointed Nordyke "as defendant's representative in these criminal proceedings authorized to make decisions on behalf of defendant as deemed necessary and in best interest of Michael Owen Perry." (J.A. 47). On March 14, 1988, pursuant to the authority granted by the district court and without notice to the State, Nordyke instructed the state prison authorities to remove Perry from all psychotropic medication. (R. 91, 184). Prior to that time, Perry was apparently voluntarily taking Haldol as prescribed by his treating psychiatrists. (R. 518, 554, 594).

The members of the sanity commission separately examined Perry in February and early March of 1988. (R. 509, 589, 637; J.A. 79). On April 20, 1988, the court conducted an evidentiary hearing on the issue of Perry's competency. (J.A. 47). At the hearing, Perry introduced various medical records (R. 539-40, 541-45) and called all four members of the sanity commission to testify (R. 505, 545, 579, 634). In addition, Perry took the stand in support of his claim of incompetence. (R. 661). Over the State's objection, the court allowed Perry's testimony to be videotaped and ordered the videotape made a part of the record in the case. (R. 660-61). At the conclusion of the hearing, the court took the matter under advisement and invited memoranda from the parties. (R. 691-92).

Shortly after the hearing, on April 29, 1988, Nordyke contacted Dr. Kay Kovac, medical director at the Louisiana State Penitentiary, regarding Perry's condition. (R. 714; J.A. 103). Nordyke authorized Dr. Kovac to administer psychotropic drugs to Perry whenever medically necessary. (J.A. 103).

Prior to issuing its ruling, the court requested that the Louisiana Department of Public Safety and Corrections provide the court with updated information on Perry's condition. (R. 698-99). Pursuant to this request, the Department submitted several documents regarding Perry's mental health: a letter and notes by Dr. Kovac, a report to Dr. Kovac from social worker Marie Hughes, notes by Ms. Hughes, and notes by social worker Randy Parent. (J.A. 100-106). Soon thereafter, on June 22, 1988, Perry filed an objection to admission of the documents into evidence. (R. 193-97). On the same day, Nordyke

again instructed authorities at the Louisiana State Penitentiary to discontinue treating Perry with medication. (R. 204).

On August 26, 1988, the court overruled Perry's objection to the evidence submitted by the Department of Public Safety and Corrections and ordered the evidence filed into the record. (J.A. 48). Based on that evidence, the court concluded that "there has probably been a change in the mental condition of the defendant." (R. 700). As a result, the court ordered Dr. Jimenez and Dr. Cox to re-examine Perry and to appear at a sanity hearing to be held on September 30, 1988. (J.A. 49). In addition, the court vacated its order authorizing Nordyke to make decisions for Perry and ordered that, pending the September hearing, Perry be treated and medicated "as to be determined by the medical staff of the Department of Public Safety and Corrections." (J.A. 49).

Perry applied to the Louisiana Supreme Court for supervisory writs to review the district court's orders. The state supreme court stayed the order authorizing forcible medication but refused to stay the September hearing. (R. 305, 314).

At the September hearing, the court called Dr. Cox and Dr. Kovac to testify. (R. 713, 735). Dr. Jimenez was unable to appear at the hearing due to illness. (R. 712). Consequently, the court scheduled a third competency hearing in order to allow Dr. Jimenez to testify. (R. 747). Following Dr. Jimenez's testimony at the third and final hearing on October 21, 1988, the court asked Nordyke whether he wanted to present any evidence on Perry's behalf. (J.A. 125). Nordyke declined the court's invitation. *Id.*

Evidence

The medical experts agree that Perry suffers from schizoaffective disorder, a mental illness which affects both mood and thought. (R. 511-12; J.A. 78, 89, 94). As explained by Dr. Cox and Dr. Jimenez, schizoaffective disorder is characterized by symptoms such as mood swings, paranoia, disorganized thinking, delusions and hallucinations. (R. 514, 559; J.A. 70-71). The illness is incurable and can be managed only with medication. (R. 513; J.A. 81). Antipsychotic drugs, such as Haldol, can be used to control the symptoms of schizoaffective disorder; such medication reduces delusions, hallucinations, and paranoia and improves concentration and

cohesiveness of thought. (R. 518-19, 567-69).

As a result of his mental illness, Perry sometimes has diminished contact with reality. (R. 615; J.A. 80, 94). For example, he has repeatedly expressed a belief that he is god and that, since the age of seven, he has been married to a woman named Susan Bordelon. (R. 592, 641; J.A. 71, 94-96). He has also claimed that he hears voices. (R. 592-93, 663; J.A. 59-60). In addition, Perry's thoughts are sometimes rambling and disorganized; as demonstrated by his testimony at the April hearing, he jumps from one topic to another without direction or cohesion. (R. 515, 590-91, 670-71). At times, he is ambivalent and relates inconsistent information; for example, he has on several occasions both denied and admitted that he murdered his family. (R. 511, 629, 667; J.A. 92).

Perry's mental condition improves with medication. (R. 520, 553-55, 561; J.A. 100-102). As explained by Dr. Cox, when Perry is treated with psychotropic medication, he is less hostile, his thinking is more rational and coherent, and he is in better contact with reality. (R. 568-69). Although Perry has developed some minor side effects from the medication, such as stiffness and drooling, he has not exhibited signs of the more serious tardive dyskinesia. (R. 573-74; J.A. 72-73). Moreover, according to Dr. Jimenez, Perry has exaggerated the side effects. (J.A. 72-73). With the exception of Dr. Estes, the members of the sanity commission recommended that Perry be treated with neuroleptic medication. (R. 554-55, 616; J.A. 70, 88). Dr. Estes was not "prepared to recommend a course of treatment." (J.A. 94-95).

At the competency hearings, each of the members of the sanity commission expressed an opinion as to Perry's understanding of his death sentence. Dr. Jimenez repeatedly testified that Perry "does understand that he's convicted of the death of his family and he does understand that the penalty is death." (J.A. 72-73, 77, 122-23). Dr. Cox likewise found that Perry "was aware of the fact that he was under a sentence of death, that the process of electrocution could kill him and . . . he was aware of why he was on death row." (J.A. 115-16, 85-86). According to Dr. Cox, Perry's competence depends on his medication: "[w]hen he's on medication I think he's competent, when he's not I don't think he is." (R. 571). Dr. Vincent expressed some doubt as to Perry's understanding that he committed the murders. (J.A. 92). Dr. Vincent concluded, however, that Perry understood that

he would be executed if found competent to proceed and that Perry also understood "that if an individual murders somebody[,] they can be found guilty and then could be executed legally." (J.A. 91-92). Dr. Estes, the only member of the sanity commission to examine Perry only once, opined that "Perry is not completely aware of the nature of the current proceedings against him. . . . He does not understand his sentence as punishment for what he did wrong." (J.A. 63).

Decision of the State Court

At the conclusion of the October hearing, the district court issued its ruling. (J.A. 126-147). The court held that the procedural requirements of La. C.Cr.P. arts. 641-649.1, *see* Appendix B, regarding pre-trial determinations of mental capacity to proceed also apply to inquiries into post-conviction competency. (J.A. 131). Because Louisiana law is silent with respect to the substantive standard governing determinations of competency to be executed, the court adopted the standard articulated by Justice Powell in *Ford v. Wainwright*, 477 U.S. 399 (1986): "the State is prohibited from executing those who are unaware of the punishment they are about to suffer and why they are to suffer it." (J.A. 128-30, 141). Applying that standard to the evidence, the court found that "the defendant is competent for execution. It is further obvious from the testimony that he is competent only while maintained on psychotropic medication in the form of Haldol." (J.A. 145).

Having found that medication is an essential prerequisite to Perry's competence, the court turned to the issue of nonconsensual medication. *Id.* The court observed that "the right to refuse medical treatment has been specifically recognized as a subject of constitutional protection." (J.A. 139). Nevertheless, the court concluded that the State's interest in carrying out the death penalty outweighs Perry's liberty interest in being free from unwanted medication:

Louisiana's interest in the execution of [the] jury's verdict override [sic] those rights of Mr. Perry. The State is entitled to have that judgment made executory. To allow Mr. Perry to have the authority to make this decision and to refuse treatment and thereby become incompetent would allow total usurpation [sic] of the criminal laws

(J.A. 146). Accordingly, the court ordered that "the Louisiana Department of Public Safety and Corrections . . . maintain the defendant on [antipsychotic] medication as to be prescribed by the medical staff of said Department and if necessary . . . administer said medication forcibly to defendant and over his objection." (J.A. 148-49).

The court stayed execution of its judgment in order to allow Perry the opportunity to seek review in the Louisiana Supreme Court. (R. 794). The state's high court denied review of the district court's ruling. *State v. Perry*, 543 So.2d 487 (La. 1989), *reh'g denied*, 545 So.2d 1049 (La. 1989). (J.A. 150-51). Petitioner now seeks relief from that decision of the Louisiana Supreme Court.

SUMMARY OF THE ARGUMENT

1. The state court correctly found that, when treated with antipsychotic medication, Perry is competent to be executed. The evidence presented at the competency hearings demonstrates that, as long as he is medicated, Perry understands that he has been convicted of the murders of five members of his family and that, as a result, he has been sentenced to die. Thus, when Perry is maintained on medication his understanding of his sentence of death satisfies the Eighth Amendment competency standard articulated by Justice Powell in *Ford v. Wainwright*, 477 U.S. 399 (1986). Neither the Eighth nor the Fourteenth Amendment requires application of a broader standard of incompetency. In the first place, a majority of this Court held in *Ford* that the Eighth Amendment does not provide mentally ill prisoners with more protection than suggested by Justice Powell. *Ford*, 477 U.S. 399 (Powell, J., concurring in part and concurring in the judgment); *id.* (O'Connor, J., concurring in the result in part and dissenting in part); *id.* (Rehnquist, J., dissenting). There is no reason now for this Court to expand the Eighth Amendment's prohibition of execution of the insane beyond the limits recognized in *Ford*. Secondly, Louisiana has not created a liberty interest which is protected by the Fourteenth Amendment in application of a definition of insanity which is more expansive than that set out in *Ford*. Because Louisiana law is silent with regard to the substantive standard applicable to claims of incompetency to be executed, a state prisoner cannot claim a justifiable expectation in application of any particular standard of incompetency.

2. The state court order authorizing medication of Perry without his consent does not violate the Eighth Amendment. The record is replete with evidence of the benefits to Perry of antipsychotic medication. Because such medication is actually good for Perry, it cannot reasonably be considered cruel and unusual punishment. In fact, because Perry is incompetent to make his own treatment decisions, under the doctrine of *Estelle v. Gamble*, 429 U.S. 97 (1976), the State is *required* to treat Perry with neuroleptic medication, with or without his consent, in order to relieve the suffering caused by his mental illness. In any case, regardless of the benefits to Perry of antipsychotic medication, the use of medication to produce competency does not violate the Eighth Amendment. First, there is no national consensus against the use of appropriate psychiatric treatment to restore competency for execution. Second, by allowing the State to carry out validly imposed death sentences, treatment of death row inmates which produces competency for execution serves the fundamental penological goals of retribution and deterrence. Third, medication of condemned prisoners is not disproportionate punishment for the crime of first degree murder. In this case in particular, such treatment is amply justified by Perry's merciless killings of five members of his family.

3. Perry does not have a Fourteenth Amendment right to refuse the medication authorized by the state court. Without question, a sentence of death justifies restrictions on a condemned inmate's liberty which are necessary to effectuate the death penalty. Thus, the due process right to refuse medication recognized in *Washington v. Harper*, ___ U.S. ___, 110 S.Ct. 1028 (1990), does not extend to death row inmates who require medication to be competent for execution. Also, because Louisiana law does not use explicitly mandatory language to limit the circumstances under which a prisoner can be treated with antipsychotic medication, Perry cannot claim a constitutional entitlement based on Louisiana law to avoid the medication at issue. Finally, assuming *arguendo* that either the Due Process Clause or Louisiana law does create a liberty interest in refusing medication which produces competency for execution, that interest is overridden by the State's interest in carrying out the death penalty.

4. The state court's conduct of adversarial hearings on the issue

of competency, accompanied by the full array of attendant procedural protections, more than satisfied the procedural demands of the Fourteenth Amendment. Any failure of the state court to comply with procedures mandated by Louisiana law is irrelevant to the due process analysis. Moreover, because Perry's counsel had ample opportunity to refute the evidence submitted by the Department of Public Safety and Corrections, the court's consideration of that evidence did not violate the Due Process Clause.

ARGUMENT

I. Michael Owen Perry is competent to be executed because, when on his prescribed medication, he is aware of the penalty he is to suffer and he understands the reason he is to suffer that penalty.

Perry understands that he has been sentenced to death for the murders of five members of his family. As a result, he is competent to be executed; *Ford v. Wainwright*, 477 U.S. 399 (1986), does not require more. Moreover, contrary to Perry's assertions, Louisiana has not vested him with a constitutionally protected liberty interest in application of a competency standard which is stricter than that enunciated in *Ford*.

A. Under *Ford v. Wainwright*, 477 U.S. 399 (1986), mentally ill prisoners are incompetent to be executed only when their understanding of their sentence of death is impaired.

In *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court held that the Eighth Amendment proscribes execution of the insane. In line with its prior decisions, the Court explained that the Eighth Amendment prohibits punishments which were considered cruel and unusual at the time the Bill of Rights was adopted as well as punishments which are contrary to "evolving standards of decency." *Id.* at 406, quoting *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion). Thus, in reaching its decision, the Court examined both common law and contemporary views toward executing the insane. The Court found that execution of the insane was prohibited at common law and remains prohibited in every state in the union. Accordingly, the Court concluded that "the Eighth Amendment prohibits a State from

carrying out a sentence of death upon a prisoner who is insane." *Id.* at 409-10.

The *Ford* majority opinion did not define insanity for purposes of the Eighth Amendment ban on executing the insane. Justice Powell, however, in a concurring opinion, specifically addressed the issue of what constitutes insanity in this context. Justice Powell pointed out, as did the majority, that a number of explanations have been advanced as justifying the common law rule against execution of the insane. One theory is "that the prohibition against executing the insane was justified as a way of preserving the defendant's ability to make arguments on his own behalf." *Id.* at 419 (Powell, J., concurring in part and concurring in the judgment). In light of the expansive procedural protections now afforded defendants, Justice Powell dismissed that theory as having only "slight merit today." *Id.* at 420. On the other hand, Justice Powell recognized that "[t]he more general concern of the common law—that executions of the insane are simply cruel—retains its vitality." *Id.* at 421. He explained:

It is as true today as when Coke lived that most men and women value the opportunity to prepare, mentally and spiritually, for their death. Moreover, today as at common law, one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose.

Id. In accordance with those concerns, Justice Powell concluded that "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422.

Justice Powell's standard for determining competency to be executed does not distinguish between treated and untreated inmates. The standard is explicitly framed in terms of the condemned inmate's *awareness* of his sentence of death and the reasons for it; the standard thus focuses on the inmate's understanding, not on his diagnosis or treatment. Justice Powell explained that the Eighth Amendment's proscription of execution of the insane serves two purposes: "[i]f the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing." *Id.* Without

question, those objectives are satisfied as long as a death row inmate understands his sentence of death, regardless of whether his understanding is produced with medication. Indeed, Justice Powell implicitly recognized that competency achieved through medical treatment satisfies the Eighth Amendment requirement: "[i]t is of course true that some defendants may lose their mental faculties and never regain them, and thus avoid execution altogether. My point is only that if petitioner is cured of his disease, the State is free to execute him." *Id.* at 425 n.5.

It is the State's position that Justice Powell's standard governs claims of incompetency to be executed under the Eighth Amendment. Although Justice Powell was the only member of the *Ford* majority to expressly adopt that standard, the other members of the majority implicitly recognized the same standard in Justice Marshall's plurality opinion: "[i]t is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Id.* at 417 (plurality opinion). Moreover, Chief Justice Burger and Justices Rehnquist, White and O'Connor rejected entirely the notion that the Eighth Amendment offers the insane shelter from execution. *Id.* (O'Connor, J., concurring in the result in part and dissenting in part); *id.* (Rehnquist, J., dissenting). Thus, a majority of the Court explicitly refused to recognize an Eighth Amendment right more expansive than that outlined by Justice Powell. Justice Powell's opinion therefore defines the outer limits of the Eighth Amendment right recognized in *Ford*. Additionally, it is significant that this Court has recently quoted Justice Powell's standard in referring to the holding in *Ford*: "under *Ford v. Wainwright*, 477 U.S. 399 (1986), someone who is 'unaware of the punishment they are about to suffer and why they are to suffer it' cannot be executed. *Id.* at 422 (Powell, J., concurring in part and concurring in judgment)." *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934, 2954 (1989). See also *Lowenfield v. Butler*, ___ U.S. ___, ___, 108 S.Ct. 1456, 1457 (1988) (Brennan, J., dissenting from denial of application for stay of execution); *Johnson v. Cabana*, ___ U.S. ___, ___, 107 S.Ct. 2207, 2208 (1987) (Brennan, J., dissenting from denial of petition for writ of certiorari and denial of application for stay of execution).

Noting that this Court has not explicitly established a standard

for determining competency to be executed, Perry urges this Court to adopt a definition of insanity which is more expansive than that articulated by Justice Powell. In particular, Perry maintains that "[t]he definition of competency [to be executed] should . . . include a requirement that the inmate's competency be stable and predictable" as well as a requirement that the condemned inmate "be able to provide meaningful assistance in the defense of his life." Brief for Petitioner at 50, 55. However, as explained above, Justice Powell's standard represents the outer boundaries of the Eighth Amendment prohibition against executing the insane. While the Eighth Amendment may require *less* in this context than suggested by Justice Powell, a majority of this Court has held that it does not require *more*. *Ford*, 477 U.S. 399 (Powell, J., concurring in part and concurring in the judgment); *id.* (O'Connor, J., concurring in the result in part and dissenting in part); *id.* (Rehnquist, J., dissenting). Moreover, as explained below, there is no reason for this Court to expand the protection of the Eighth Amendment as Perry advocates.

Perry's first suggested addition to Justice Powell's standard is a requirement that competency for execution be "stable and predictable." Brief for Petitioner at 50. According to Perry, such a standard would ensure competency at the time of execution and would avoid repeated evidentiary hearings to evaluate changes in a condemned inmate's mental condition. However, Perry's proposed requirement of stable and predictable competency for execution is both unnecessary and unworkable. In the first place, Perry fails to elaborate on the meaning of "stable and predictable" competency. Thus, it is unclear whether the standard posed by Perry would actually serve as an effective protection against execution of the insane. Moreover, Perry's insistence on predictable competency demands the impossible. Regardless of the degree of stability and predictability required for a finding of competency, no competency standard can eliminate the possibility of post-hearing deterioration of a death row inmate's condition; after a determination of competency, there is *always* the possibility that the inmate's condition will change before execution. Hence, in order to cure the flaw Perry imagines in the *Ford* standard, this Court would have to outlaw the death penalty altogether. Furthermore, the defect Perry claims to find in Justice Powell's standard is nonexistent. Because a death row inmate is entitled to repeatedly raise a claim of incompetency up until the

moment of his execution, he is amply protected by Justice Powell's standard even if his condition deteriorates following a determination of competency. So, even assuming, as Perry contends, that his competency changes unpredictably from day to day, he is adequately protected by the *Ford* standard because he can raise the issue of incompetency on each "bad day." Brief for Petitioner at 51.

Although Perry expresses concern that Justice Powell's standard invites repeated competency hearings, the possibility of repeated hearings is irrelevant to the Eighth Amendment analysis; the Eighth Amendment cannot be construed to exempt death row inmates from execution merely because of an anticipated burden on the judicial system. While the prospect of repeated competency hearings might justify statutory limitations on the State's right to enforce the death penalty, that prospect is not a legitimate ground for constitutionalizing an expansive definition of insanity.³

Perry secondly seeks recognition of an Eighth Amendment prohibition against executing capital offenders who are unable to assist in their defense. However, no such limitation on the death penalty can be found in the Eighth Amendment. As the majority in *Ford* pointed out, there is no uniform rationale underlying the proscription of executing the insane; both at common law and today, several theories have been advanced as justifying the rule.⁴ *Ford*, 477

³Moreover, the specter of multiple hearings on an inmate's competency is plainly illusory. In order to trigger the right to a competency hearing, a Louisiana capital offender must demonstrate "a reasonable ground to believe he is presently insane." *Perry*, 502 So.2d at 564 (J.A. 43-44). See also *Ford*, 477 U.S. at 426 (Powell, J., concurring in part and concurring in the judgment). Thus, an inmate who has been found competent cannot provoke a subsequent competency hearing unless he makes a threshold showing that his condition has deteriorated to the point of incompetency. It is unlikely then that a condemned prisoner will be entitled to repeated competency hearings.

⁴The *Ford* majority opinion quotes Blackstone's explanation of the common law ban on executing the insane: "had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." *Ford*, 477 U.S. at 407, quoting 4 W. Blackstone, Commentaries *24-*25. Notably, however, that rationale is conspicuously absent from the Court's discussion of the reasons for the rule against executing the insane. See *Ford*, 477 U.S. at 407-410.

U.S. at 407-410. Consequently, there is no contemporary or historical consensus that a prisoner should not be executed unless he is able to assist in his defense. Indeed, Justice Powell's standard, which does not require such ability, is the "prevailing test" among the states. *Ford*, 477 U.S. at 422 n.3 (Powell, J., concurring in part and concurring in the judgment). That standard is therefore consistent with "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). In short, execution of prisoners who are unable to assist in their defense has never been uniformly viewed as cruel and unusual punishment. As a result, execution of such criminal offenders is not prohibited by the Eighth Amendment. See pp. 33-35, *infra*.

In addition, as recognized by Justice Powell, a requirement that a death row inmate be able to assist in his defense is of limited utility in light of the expansive procedural protections now afforded criminal defendants: "[t]hese guarantees are far broader than those enjoyed by criminal defendants at common law. It is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free." *Ford*, 477 U.S. at 420 (Powell, J., concurring in part and concurring in the judgment). Moreover, as Justice Powell explained, because due process requires that defendants be competent to stand trial, "the notion that a defendant must be able to assist in his defense is largely provided for. See *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975)." *Id.* at 421 (footnote omitted). It is certainly difficult to conceive of a situation in which a mitigating fact or argument which was overlooked by a competent criminal defendant and his counsel at the trial stage would suddenly come to the attention of the defendant prior to execution.

Finally, the danger of executing an individual who may discover or remember a fact or argument in avoidance of the death penalty is not limited to mentally ill inmates. Even "perfectly sane inmates, given enough time, might be able to develop new defenses or devise better appeals." Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 Fla.St. U.L. Rev. 35, 50 (1986). Moreover, even sane inmates may fail to recognize the significance of important information or may forget relevant facts. Thus, the only way of guarding against executing an individual who may one day discover

an argument which would save him from execution is to eliminate the death penalty entirely. Such certainty is clearly not required by the Eighth Amendment.

B. Louisiana has not created a constitutionally protected liberty interest in avoiding execution while incompetent which is greater than the right recognized in *Ford v. Wainwright*, 477 U.S. 399 (1986).

Perry maintains that Louisiana has adopted a standard of competency which is stricter than the standard enunciated by Justice Powell and which enjoys the protection of the Fourteenth Amendment. Specifically, Perry asserts that La. C.Cr.P. art. 641 establishes the Louisiana substantive standard for judging claims of incompetency to be executed and creates a constitutionally protected liberty interest in application of that standard. That argument reflects a misunderstanding of both Louisiana law and Fourteenth Amendment doctrine.

La. C.Cr.P. art. 641 provides that "[m]ental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense." Relying on that provision, Perry contends that a Louisiana death row inmate is not competent to be executed unless he both understands his sentence of death as required by *Ford* and is able to "assist in his defense." *Id.* As recognized by the state court, however, Article 641 applies to determinations of "competency to stand trial," not competency for execution. (J.A. 129-30).

Article 641 is found in Louisiana Code of Criminal Procedure Title XXI, Chapter 1, entitled "Mental Incapacity to Proceed." See Appendix B. When read *in pari materia* with the remainder of the chapter, Article 641 cannot be reasonably interpreted as applying to claims of incompetency to be executed. For example, the Official Revision Comment to La. C.Cr.P. art. 642 notes that "[i]t is in the interest of fair administration of justice that a defendant who lacks the capacity to understand the proceedings against him and to assist in his defense *should not be brought to trial* while that condition exists." La. C.Cr.P. art. 642 Official Revision Comment (emphasis added). Similarly, La. C.Cr.P. art. 648 provides that the court shall determine whether the "defendant [is] *incapable of standing trial*." La. C.Cr.P.

art. 648B(3) (emphasis added). Other references in the chapter's provisions and commentary likewise compel a conclusion that Article 641 applies only to determinations of competency to stand trial. See e.g., La. C.Cr.P. art. 642 ("there shall be no further steps in the criminal prosecution"); La. C.Cr.P. art. 642 Official Revision Comment ("present incapacity to stand trial is ordinarily urged by the defense"); La. C.Cr.P. art. 648B(1) ("treatment [shall not] exceed the time of the maximum sentence the defendant could receive if convicted of the crime with which he is charged"); La. C.Cr.P. art. 649 Official Revision Comment ("The court's determination of the question of regained capacity to stand trial is in accord with [precedent]").

Despite the clear language of the Code, Perry insists that Article 641 applies to claims of incompetency to be executed. He argues that the Louisiana Supreme Court adopted the Article 641 standard as applicable in the post-conviction context in *State v. Allen*, 15 So.2d 870 (La. 1943), and in this case on direct appeal, *State v. Perry*, 502 So.2d 543 (La. 1986) (J.A. 1-44). Neither case, however, provides support for Perry's strained interpretation of Article 641.

In relying on *Perry* and *Allen*, Perry has apparently confused substance with procedure. In *Allen*, the Louisiana high court recognized that "[o]ne who has been convicted of a capital crime and sentenced to suffer the penalty of death, and who thereafter becomes insane, cannot be put to death while in that condition." *Allen*, 15 So.2d at 871. The issue in *Allen* was solely a *procedural* one: whether the trial court erred in failing to appoint experts to evaluate the condemned prisoner's mental condition. *Id.* The court ruled that the procedures which govern claims of incompetency to stand trial should also be applied to claims of post-conviction insanity: "for the same reason that a person is entitled to a hearing before conviction on the question of his sanity, he is entitled to a hearing after conviction; and the same rules of *procedure* govern." *Id.* (emphasis added). The court did not rule, however, that the same *substantive* standards govern claims of pre-trial and post-conviction incompetency; the substantive issue was simply not before the court.

In *Perry*, the Louisiana Supreme Court suggested that an inquiry into Perry's competency "might be in order prior to execution." (J.A. 44). As in *Allen*, the court indicated that the *procedures* applicable to determinations of capacity to stand trial would govern such an

inquiry. (J.A. 43-4). But, with regard to the applicable substantive standard, not once did the court cite Article 641 or refer to a requirement that Perry be able to assist in his defense. *Id.* To the contrary, the court implicitly adopted the *Ford* standard: "[t]he State will not impose the death penalty on Michael Owen Perry if a court determines he has become insane subsequent to his conviction for first degree murder and *lacks the capacity to understand the death penalty.*" (J.A. 43) (emphasis added).

From the above discussion, one thing is perfectly clear: Louisiana has not expressly adopted the Article 641 standard in the post-conviction context. As a result, Louisiana has not created a constitutionally protected liberty interest in application of that standard to claims of incompetency to be executed. This Court has explained that a state creates a liberty interest protected by the Fourteenth Amendment when state law uses "explicitly mandatory language in connection with requiring specific substantive predicates." *Hewitt v. Helms*, 459 U.S. 460, 472 (1983). Accord *Kentucky Department of Corrections v. Thompson*, ___ U.S. ___, 109 S.Ct. 1904 (1989). The Louisiana statutes obviously do not use "explicitly mandatory language" to apply Article 641 to determinations of post-conviction insanity. In fact, in *Perry*, the Louisiana Supreme Court implicitly rejected such an application of Article 641. (J.A. 43). At the very least, then, the Louisiana substantive standard for determining competency for execution is unclear. Consequently, Perry cannot claim a "justifiable expectation rooted in state law" that he will not be executed unless he is able to assist in his defense. *Montanye v. Haymes*, 427 U.S. 236, 242 (1976).

C. When Perry is on prescribed medication, his understanding of his sentence of death satisfies the *Ford v. Wainwright*, 477 U.S. 399 (1986), requirement of competency to be executed.

Applying Justice Powell's standard to this case, there can be little doubt that Perry is competent to be executed. Admittedly, Perry has a history of mental illness. Yet that illness did not render him incompetent to stand trial. (J.A. 11). Nor, in the jury's eyes, did it mitigate against application of the death penalty. (J.A. 38). Similarly, Perry's illness does not now prevent him, when properly treated, from understanding his sentence of death.

The state court correctly applied Justice Powell's standard and found that "it is obvious . . . that [Perry] is competent for execution." (J.A. 141, 145). That determination is entitled to substantial deference. As noted in *Stein v. New York*, 346 U.S. 156, 181 (1953), this Court will not overturn factual findings of a state court except to correct "miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do." Even a *de novo* review of the record, however, reveals overwhelming evidence that Perry understands his sentence of death.

Three of the four members of the post-conviction sanity commission indicated that Perry is aware of his impending execution and that he understands the reason for it.⁵ Of the commission members, Dr. Jimenez and Dr. Cox were firmest in their conclusions that Perry understands his sentence of death. Dr. Jimenez repeatedly testified that Perry knows that he is going to be put to death for the murders of his family. (J.A. 72-73, 77, 122-23). She stated in no uncertain terms that Perry "does understand that he killed his family and he does understand that he is getting the chair for that crime." (J.A. 77). Likewise, Dr. Cox concluded that, as long as Perry is treated with medication, he is competent to be executed. (R. 571). Dr. Cox testified that, when Perry was examined, he "was aware of the fact that he was under a sentence of death, that the process of electrocution could kill him and . . . he was aware of why he was on death row." (J.A. 115-16).

Although Dr. Vincent did not state his opinion regarding Perry's understanding of his death sentence as decisively, or as clearly, as Drs. Jimenez and Cox, his testimony reveals that Perry does understand his sentence of death. Dr. Vincent noted that, when Perry was examined, "he knew that he would be executed if he were found

⁵Perry's assertion that all of the members of the sanity commission found him incompetent, Brief for Petitioner at 45, is a gross mischaracterization of the experts' testimony. As explained in the text, only Dr. Estes found Perry incompetent under the *Ford* standard. While the other sanity commission members referred to Perry at times as "incompetent," their testimony reveals that all three found that Perry was aware of his impending execution and the reason for it. (J.A. 72-73, 85, 91-92; R. 628).

competent to proceed." (R. 590). Dr. Vincent further testified that Perry understands the functions of the court and "the charges." (R. 626, 628). When asked whether Perry understands the reasons for the death penalty, Dr. Vincent responded:

That's a much more difficult issue. I think he has the understanding that if an individual murders somebody [,] they can be found guilty and then could be executed legally. I think he understands that. I'm not really convinced that he understands that he did the murders. I think that varies tremendously.

(J.A. 92). In other words, Dr. Vincent doubted Perry's understanding of his guilt. He did not, however, question Perry's understanding of the connection between his conviction and his upcoming execution. To the contrary, Dr. Vincent testified that Perry knows the charges of which he was convicted, he knows that convicted murderers can be executed, and he knows that he will be executed if found competent. Considered as a whole, then, Dr. Vincent's testimony supports a conclusion that Perry is competent to be executed.

Dr. Estes was the only member of the sanity commission to conclude that Perry "is not completely aware of the nature of the current proceedings against him. . . . He does not understand his sentence as punishment for what he did wrong." (J.A. 63). In addition, Dr. Estes opined that Perry "failed to acknowledge the finality of his death sentence." *Id.* Dr. Estes did concede, however, that Perry knows that he is on death row and that, if found competent, he will be executed. *Id.*

Dr. Estes was also the only member of the sanity commission to examine Perry only once; his opinions are based on a single sixty-minute interview. (R. 649). Accordingly, when measured against the testimony of experts who saw Perry on numerous occasions, his testimony merits little weight. In contrast, the testimony of Dr. Jimenez and Dr. Cox, which is based on extensive experience in both evaluating and treating Perry, is entitled to great weight. Dr. Jimenez was Perry's treating physician during his pre-trial confinement at the Feliciana Forensic Facility. (R. 509). She also testified as the State's expert in the penalty phase of the trial. (J.A. 10). Dr. Cox was Perry's treating psychiatrist on death row. (R. 546). Thus, Dr. Cox and Dr. Jimenez were thoroughly familiar with Perry's case prior to their

appointment to the sanity commission. In addition, at the court's direction, Dr. Jimenez and Dr. Cox, unlike Drs. Vincent and Estes, re-examined Perry after the first sanity hearing. (J.A. 49, 114, 122-23). Following re-evaluation of Perry's condition, both confirmed their initial conclusion: Perry is aware of his impending execution and the reasons for it. (J.A. 115-16, 122-23).

Aside from the opinions of the sanity commission members, Perry's own words belie the contention that he is incompetent for execution. For example, Perry's statements to Dr. Kovac regarding his refusal to take his medication are particularly telling:

[Perry] went on to say that his attorney had instructed him not to take the medicine. And I said, well, you know, I understand but I think just for your best health we really need to talk about this because I think it's in your best health to take your medicine. And, uh, Mr. Perry said, no, my attorney has told me not to take my medicine. He said, it's just—it's very simple to understand, take my pills and die, don't take my pills and live. And he said, so, I'm not going to take my pills. . . . I'm not going to take my injections any more either. . . . [M]y attorney said this is going to go to the supreme court. And he said, I'm just not going to take any—I don't want any injections, I don't want any other medications.

(J.A. 113-14). Perry made substantively identical comments to Dr. Jimenez and to a hospital social worker. (J.A. 104-05, 123). In addition, Perry told the social worker that "he does not believe he is 'crazy' but if 'they' think he is, he will not get 'burned.'" (J.A. 104). Obviously, Perry is keenly aware that he is going to be put to death.

Perry's statement to Dr. Jimenez regarding Charles Manson even more clearly reveals his understanding of his sentence:

[Perry] talk[ed] about having seen a program about Charles Manson, and he was—he voiced some concerns about the picture and his opinions about that show. . . . It was about a show by *Geraldo*, and it was on Charles Manson, and he was questioning the fact as to why Charles Manson had people killed, or killed some people, and he was not being executed and why, why he, who only killed five people should be executed.

(J.A. 124). Certainly, these are not the words of someone "whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Ford*, 477 U.S. at 417 (plurality opinion).

In spite of the overwhelming evidence of his competency, Perry insists that he is not competent for execution because his mental condition changes rapidly and unpredictably even when he is on medication; he concludes that medication is unsuccessful "in achieving sustained or predictable competency." Brief for Petitioner at 24. That conclusion is simply without foundation in the record. The great bulk of the evidence, discussed above, reveals that Perry is competent for execution. But, as found by the district court, his competency is unquestionably dependent on his receipt of medication. (J.A. 145). Thus, Perry's competency changes when changes are made in his medication. There is no evidence, however, that Perry's competence varies while he is on medication. Dr. Cox, who originated the now familiar "moving target" reference, explained that Perry is a "moving target" because he responds rapidly to changes in his medication. (J.A. 81-82). Dr. Cox did *not* testify that Perry is a "moving target" when on medication. Rather, Dr. Cox made it perfectly clear that, as long as Perry is maintained on medication, he is competent to be executed.⁶ (R. 571). Hence, contrary to Perry's claim that his competency is ephemeral and unpredictable, Perry's competency is entirely sustainable and predictable with medication; it is only when Perry is removed from medication that his competency is unpredictable.⁷

In support of his claim of incompetency, Perry directs this Court to several portions of the record. First, he relies heavily on the medical records from the state penitentiary. (D.Ex. 5; R. 544-45).

⁶Dr. Cox does acknowledge that, because the medication does not take effect immediately, Perry has, at times, been incompetent even while on medication. (J.A. 80). See Kemna, *Current Status of Institutionalized Mental Health Patients' Right to Refuse Psychotropic Drugs*, 6 J. Legal Med. 107, 110 n.15 (1985) ("after oral administration the maximum effect [of antipsychotic drugs] does not develop for several hours.")

⁷Interestingly, the instability of which Perry now complains is caused by his own refusal to take medication and by his counsel's actions in putting him on and taking him off medication. (R. 184, 204; J.A. 103).

Indeed, Perry's brief describes the day-to-day observations of his behavior from December 1985 to January 1988 in excruciating detail. Brief for Petitioner at 5-12. According to Perry, the medical records demonstrate that his competency is fleeting and unpredictable. Yet those records shed little light on the question of Perry's competency. Unlike the testimony of the sanity commission members, the medical records are not focused on the issue of Perry's understanding of his sentence of death. As a result, the bizarre behavior described in the records is, for the most part, irrelevant to the competency determination. For example, the fact that Perry feeds soap to the toilet or shaves his eyebrows does not indicate that he is incompetent to be executed. As explained by Dr. Cox, Perry can have psychotic symptoms and still remain aware of his sentence of death. (J.A. 83). Moreover, the medical records do not support Perry's contention that his illness is not controllable with medication. In fact, Perry's discussion of the medical records reveals that, each time he was hospitalized for medication, his condition quickly stabilized and he was promptly released from the hospital.⁸ Brief for Petitioner at 5-12.

⁸Admittedly, portions of the medical records seem to indicate that Perry decompensates even when on medication. However, several factors weigh against concluding from those portions of the record that Perry does not respond to medication. First, an indication in the record that Perry is receiving medication does not mean that he is receiving a proper dosage of medication. See Kessler & Waletzky, *Clinical Use of the Antipsychotics*, 138 Am. J. Psychiatry 202, 203 (1981) ("The most common cause of treatment failure in the management of an acute psychotic episode is prescribing an inadequate dose."). Both Drs. Cox and Jimenez have stated that Perry's medication requires adjustment. (R. 511; J.A. 115). Second, as explained by Dr. Vincent, even when the records indicate that medication was administered to Perry, one cannot be sure that Perry actually ingested the medication. (R. 594, 599). Thus, only when Perry was forcibly medicated is it certain that the medication was in fact in his system. Third, the timing and consistency of the medication must be taken into account in evaluating the effect of medication on Perry's condition. "The beneficial effect of [antipsychotic] drugs is temporary and generally does not last beyond the time the medication is eliminated from the bloodstream." *Kemna*, supra note 6, at 110 (footnote omitted). Short-acting Haldol is effective for, at most, eight to ten hours. (J.A. 116). So, it is not surprising that Perry sometimes decompensates within a day of receiving the short-acting form of medication. In contrast, injections of the long-acting Haldol D will remain

Second, Perry places great emphasis on Dr. Cox's testimony that Perry's competence is "relative" and that, even when medicated, Perry is never "completely coherent, well-intergraded [sic], rational." (J.A. 78, 84). Neither of these comments, however, supports a conclusion that Perry is not competent when medicated. In stating that Perry's competence is "relative," Dr. Cox specifically explained that Perry's competence depends on his medication: "[i]t has to do with the treatment Mr. Perry is receiving." (J.A. 78). Thus, read in context, Dr. Cox's statement regarding the relativity of Perry's competency directly contradicts Perry's assertion that he is incompetent even while on medication. Further, Perry can draw little support from Dr. Cox's opinion that Perry is never completely rational. The Constitution does not require that a condemned inmate be "completely" rational for execution; the Eighth Amendment requires only that death row inmates be aware of their impending execution and the reason for it. As Dr. Cox concluded, even though Perry is not completely rational, when medicated he does satisfy the Eighth Amendment competency requirement. (J.A. 85; R. 571).

Third, Perry points to his testimony at the April hearing as proof that he is incompetent for execution. However, at his counsel's instruction, Perry's medication was discontinued over a month before the hearing. (R. 184). Thus, thanks to Perry's counsel, Perry's testimony is absolutely useless in determining whether he is competent while medicated.

In sum, the evidence is clear that, when medicated, Perry is aware of the penalty he is to suffer and why he is to suffer it. As a result, Perry is competent to be executed.

effective for a month. (J.A. 118). However, it takes three months of medication with Haldol D supplemented by short-acting Haldol before a patient is stabilized. (J.A. 118-19). As noted by Dr. Cox, prior to the sanity hearings Perry had not been treated for three months with the long-acting Haldol and consequently he was never stabilized. (J.A. 118). Finally, as discussed at pages 28-29, the unanimous consensus of medical opinion is that Perry *does* improve with medication. Regardless of how Perry's attorneys view the medical records, none of the medical personnel who have had the opportunity to observe Perry both on and off medication doubt that Perry is competent when medicated.

II. Treating Perry with prescribed medication to maintain his competence for execution is not cruel and unusual punishment.

Perry maintains that the state court's order authorizing medication without his consent violates the Eighth Amendment.⁹ However, administration of antipsychotic medication to Perry is a legitimate response both to Perry's medical needs and to his claim of incompetency to be executed. Because medication with antipsychotic drugs is in Perry's medical interest, it cannot reasonably be considered cruel and unusual punishment. Moreover, medication of incompetent death row inmates is in accord with contemporary American views regarding treatment of death row inmates, furthers the State's penological interests in retribution and deterrence, and is consistent with the Eighth Amendment's proportionality requirement. Accordingly, such medication does not violate the Eighth Amendment.

A. Treating Perry with antipsychotic medication is beneficial to Perry and comports with the State's duty to provide prisoners with medical treatment.

Perry's brief presents a grim view of treatment with antipsychotic medication; indeed, Perry virtually equates such treatment with medical experimentation and torture. That characterization of the treatment authorized by the state court in this case is irresponsible and insupportable. In simple terms, antipsychotic medication is good for Perry. By "[p]resuming that psychotropic medications are harmful, ignoring their unquestioned therapeutic benefits, and refusing even to acknowledge the unfortunate consequences of a refusal to be treated," Perry's representatives have misled this Court and have closed their eyes to Perry's real medical needs. Brief for the American Psychiatric Association and the Washington State Psychiatric Association as *Amici Curiae*, *Washington v. Harper*, ___ U.S. ___, 110 S.Ct. 1028 (1990).

⁹Perry's argument is that *involuntary* medication to achieve competency is unconstitutional, not that execution of treated inmates is unconstitutional. In fact, Perry concedes that the State may constitutionally execute a condemned prisoner whose competence is maintained through medical treatment. Brief for Petitioner at 60.

As this Court has recognized, "the therapeutic benefits of antipsychotic drugs are well documented." *Washington v. Harper*, ___ U.S. ___, 110 S.Ct. 1028, 1041 (1990). Specifically, such drugs have been found to reduce "hallucinations, delusions, disordered thought processes, agitation, withdrawal, and other symptoms of psychotic illnesses." Gutheil and Appelbaum, *supra* note 1, at 100 (footnotes omitted). Because this Court is familiar with the use of psychotropic medication in treating psychotic illnesses, *see Harper*, ___ U.S. at ___, 110 S.Ct. at 1041, the State will not detail here the extensive psychiatric literature documenting the benefits of antipsychotic medication. *See, e.g.*, Kessler & Waletzky, *supra* note 8. It suffices to note that administration of neuroleptic medication to mentally ill patients is not an outlandish, experimental or cruel procedure; rather, as explained by the American Psychiatric Association and the Washington State Psychiatric Association, "[p]sychotropic medication is widely accepted within the psychiatric community as an extraordinarily effective treatment for both acute and chronic psychoses." Brief for the American Psychiatric Association *et al.* at 11, *Harper*, ___ U.S. ___, 110 S.Ct. 1028. *See* Brief for the American Psychiatric Association and the American Medical Association as *Amici Curiae* in Support of Petitioner at 10.

The State recognizes, of course, as did this Court in *Harper*, that antipsychotic medication can produce serious side effects. *Harper*, ___ U.S. at ___, 110 S.Ct. at 1041. The possibility of side effects, however, does not invariably render prescription of antipsychotic medication inappropriate. In almost all cases in which side effects appear, they can be eliminated by reducing the dosage of psychotropic drugs or by prescribing anti-parkinsonian medication. Gutheil and Appelbaum, *supra* note 1, at 109; Kemna, *supra* note 6, at 112. Even tardive dyskinesia, which is considered the most serious side effect of antipsychotics, "is generally mild, not necessarily progressive and very often disappears if antipsychotic medication can be halted. Although severe cases may induce some subjective distress, it is not uncommon . . . for patients to be completely unaware of their movements." Gutheil and Appelbaum, *supra* note 1, at 109 (footnote omitted). Moreover, the potential for side effects is outweighed by the substantial benefits produced by antipsychotic medication; "the overwhelming preponderance of data supports a high benefit/risk ratio for these medications and a safety record

commensurate with other powerful pharmacologic agents." Appelbaum & Gutheil, *Rotting With Their Rights On*, 7 Bull. Am. Acad. Psychiatry & L. 306, 307 (1979) (footnote omitted).

Aside from the advantages of antipsychotic drugs in general, the evidence is clear that, in this particular case, Haldol affects Perry beneficially.¹⁰ Dr. Cox testified that, although Perry is not "completely coherent, well-intergraded [sic], rational" even on medication, he "gets better when he takes medication and he gets worse when he doesn't." (J.A. 84; R. 561). Dr. Cox elaborated:

When he's taking medication he has indicated to me that he feels better, that it helps him rest better and, to me, he seems to function better. When he does not take the medication certainly there's change in his function. To me, there's been a very clear relationship between him being compliant with medicine in the clinical picture that I see when I examine him.

(J.A. 85). Specifically, Dr. Cox explained that, when Perry is medicated, he is less hostile, his thinking is more rational and coherent, and he is in better contact with reality. (R. 568-69). Similarly, Marie Hughes, a prison social worker, has reported that

¹⁰Perry contends that during the post-conviction proceedings "[m]edication was never placed at issue until the trial court decided to force medication." Brief for Petitioner at 30. He complains that the state court did not allow testimony regarding treatment, that he was not given an opportunity to be heard on the treatment issue, and that the state court made no findings as to the possible effects on him of medication. *Id.* at 27, 30. These complaints are wholly without merit. First, all of the experts were questioned and allowed to testify regarding recommended treatment. (R. 554-55, 616; J.A. 70, 88, 94-95). The court limited questioning only as to the experts' *ethical* opinion of treatment of death row inmates to achieve competency. (R. 643-44). Second, at the close of the very first sanity hearing, the court explicitly raised the issue of medication and suggested that the parties brief the issue. (R. 692). Thus, Perry's counsel was well aware of the treatment question and was given ample opportunity to address the issue. Finally, the court specifically found that neuroleptic medication is effective in rendering Perry competent for execution. (J.A. 145). Wisely, the court did not attempt to weigh the costs and benefits to Perry of such medication but rather left the decision as to the desirability of medication to the professional judgment of Perry's physicians. (J.A. 148-49).

medication results in substantial improvement in Perry's condition. (J.A. 101-02). According to Ms. Hughes, when Perry is on medication "he is able to function fairly well in his environment. He is calm, cooperative, verbally spontaneous with appropriate answers to questions . . . Delusional conversation is usually omitted unless specific questions are asked." (J.A. 101). In contrast, when Perry does not take his medication, "he exhibits bizarre behavior, threatens to kill himself and others, states that he is God, and associations are loose. He changes the subject in the middle of a sentence and such delusional matter is spontaneously verbalized." (J.A. 102). Dr. Jimenez and Dr. Kovac have also observed improvement in Perry's condition with medication. (R. 520, 724, 731-32, 761). With the exception of Dr. Estes, who refused to suggest treatment, all of the members of the sanity commission recommended that Perry be treated with neuroleptic medication. (R. 554-55, 616; J.A. 70, 88, 94-95).

Not only is Haldol effective in controlling Perry's psychosis, but Perry has not developed any severe side effects from the medication. In particular, he has not exhibited symptoms of tardive dyskinesia. (R. 552, 574). On the other hand, he has demonstrated some minor side effects, such as drooling and stiffness. (J.A. 72-73). However, Dr. Jimenez testified that Perry exaggerates those symptoms. *Id.* Moreover, such moderate adverse effects on motor functions can be eliminated with medication. (R. 553).

The uncontroverted evidence, then, establishes that treatment with psychotropic medication is in Perry's best medical interest. Indeed, Perry himself has indicated that he would voluntarily take the medication were it not for the instructions of his lawyer to the contrary. (J.A. 104). Nevertheless, Perry ingenuously suggests that the medication ordered by the state court is somehow not "treatment" because it has been judicially authorized for the purpose of maintaining competency for execution.¹¹ Perry asserts that the

¹¹Perry admits that his doctors were, in his own words, "treating" him with psychotropic drugs from 1985 until the state court issued its order authorizing nonconsensual medication. Brief for Petitioner at 27-28. Thus, Perry does not claim that administration of antipsychotic medication is inherently non-treatment. Rather, he suggests that appropriate psychiatric treatment with neuroleptic drugs was mysteriously transformed into non-treatment by the judicial order authorizing its involuntary administration.

state court's medication order considers only the State's interest in achieving competency and ignores his medical needs; as a result, he contends that medication pursuant to the court's order is not treatment.¹² Contrary to Perry's characterization of the medication order, however, the court's authorization of medication takes into account *both* Perry's medical needs and the State's interest in assuring Perry's competency for execution. Because the court's order authorizes medication only when prescribed by the prison's medical staff (J.A. 148-49), the order "ensures that the treatment in question will be ordered only if it is in the prisoner's medical interests." *Harper*, ___ U.S. at ___, 110 S.Ct. at 1037. As in *Harper*, this Court should "not assume that physicians will prescribe these drugs for reasons unrelated to the medical needs of the patients; indeed, the ethics of the medical profession are to the contrary." ¹³ *Id.* at 1037 n.8.

¹²It is ironic that Perry's counsel demands that decisions regarding medical treatment should be made by Perry's physicians in the exercise of their professional judgment without regard to non-medical considerations. As explained in the text, that is exactly what the state court order authorizes. Moreover, Nordyke's actions during his reign as Perry's decision-maker betray his expressions of concern for Perry's medical welfare. While Nordyke now proclaims that Perry's treating doctors were responsive to his medical needs, Brief for Petitioner at 27-28, during the post-conviction competency hearings, he *twice* ordered prison authorities to remove Perry from all medication without regard to the professional judgment of Perry's physicians. (R. 184, 204). Indeed, the medication issue is now before this Court only because Nordyke has instructed Perry to ignore the recommendations of his doctors. Thus, Nordyke's professed faith in the professional judgment of Perry's doctors and his concern that Perry be "treated" are, to say the least, suspect.

¹³Perry and *amici curiae* the American Psychiatric Association and the American Medical Association posit that treatment of condemned inmates to produce competency for execution is itself contrary to standards of medical ethics. The *amici curiae* go so far as to argue that even the State has a "vital" interest in avoiding violation of that supposed ethical norm. Brief for the American Psychiatric Association *et al.* at 16. However, the ethical stance assumed by Perry and the *amici curiae* is not universally accepted in the medical profession. Many psychiatrists take the position that it is unethical *not* to treat a mentally ill death row inmate, even if the ultimate result is competency to be executed. Miller, *Evaluation of and Treatment to*

Considering the benefits to Perry of antipsychotic medication, it is ludicrous for Perry to suggest that such treatment is "cruel and unusual punishment" forbidden by the Eighth Amendment. Common sense dictates that the State does not violate the Eighth Amendment by doing something good for a prisoner. As explained by Justice Brennan, the fundamental principle underlying the Eighth Amendment is that criminal penalties must comport with the basic concept of human dignity:

At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity.

Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring). *Accord Gregg v. Georgia*, 428 U.S. 153, 173, 182 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.); *Trop*, 356 U.S. at 100. While "the Court has not confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century," *Gregg*, 428 U.S. at 171 (joint opinion of Stewart, Powell and Stevens, JJ.), this Court has never extended the Eighth Amendment's proscription to *beneficial* treatment of prisoners. Medical treatment which benefits a mentally ill inmate is simply not

Competency to be Executed: A National Survey and an Analysis, 16 J. Psychiatry & L. 67 (1988); Ward, *supra* p. 16. That position recognizes the distinction between the *medical* decision to treat and the *legal* decision to impose the death penalty. Thus, many psychiatrists and the National Medical Association "endorses[e] the principle that physicians are ethically obligated to relieve suffering without consideration of subsequent non-medical consequences." Miller, *supra*, at 77.

To be sure, the ethical question posed by the decision to treat a condemned prisoner is not an easy one. But that question need not be resolved here. The constitutional issues before this Court are entirely separate from the ethical issues; it is manifest that the Constitution does not embrace any particular view of medical ethics. The ethical choice of whether or not to treat a death row inmate must be left to physicians on a case-by-case basis. If Perry's physicians continue to prescribe antipsychotic medication, as they have in the past, it is not for *amici curiae* or this Court to attempt to erect ethical barriers to such treatment.

contrary to the "dignity of man" or outside "the limits of civilized standards." *Trop*, 356 U.S. at 100. Thus, unless the Eighth Amendment is turned on its head, it cannot be construed as prohibiting appropriate and beneficial psychiatric treatment.

Despite the recognized benefits to Perry of neuroleptic medication, Perry seems to argue that nonconsensual administration of such medication constitutes cruel and unusual punishment because the State's purpose is to induce competency for execution. That argument is without merit. Medication of Perry is, of course, intended to render him competent for execution. In fact, *every* aspect of Perry's confinement contemplates, and is intended to facilitate, Perry's eventual execution. Perry's confinement itself is a precursor to execution of the death penalty. Yet his mere imprisonment is certainly not cruel and unusual punishment. Because capital punishment is an acceptable penalty under the Eighth Amendment, the State must be allowed to employ the means necessary to carry out the death penalty unless those means are themselves cruel and unusual. In short, treatment of a prisoner which is not otherwise violative of the Eighth Amendment does not become cruel and unusual punishment merely because it facilitates execution.

In this case, involuntary treatment is not only permitted by the Eighth Amendment, but it is mandated by the Amendment. This Court held in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), that "deliberate indifference to serious medical needs of prisoners" constitutes cruel and unusual punishment. Hence, the Eighth Amendment creates a State duty to provide prisoners with medical treatment. In compliance with that duty, the State has been treating Perry with psychotropic drugs since his conviction. Now, at the instructions of his lawyers, Perry refuses to accept prescribed medication. Nevertheless, the State cannot ignore its duty to care for Perry's medical needs. Because Perry loses touch with reality when he goes without his medication, he cannot be considered competent to make his own treatment decisions. Indeed, Perry's counsel conceded as much when he moved for appointment as Perry's decision-maker: "the decision making processes of the defendant are so impaired as to render them completely unreliable." (R. 187). Thus, notwithstanding Perry's refusal of medication, the State, as Perry's custodian, must ensure that he receives proper psychiatric treatment.

To honor Perry's objections and allow him to languish in a continual state of psychosis, tortured by hallucinations, delusions and paranoid fantasies, would unquestionably constitute cruel and unusual punishment. See Brief for the American Psychiatric Association *et al.* at 20.

B. There is no national consensus against involuntary medication of capital offenders to achieve competency for execution.

Even assuming for the sake of argument that beneficial medical treatment could constitute cruel and unusual punishment under some circumstances, the Eighth Amendment does not forbid prescribed medication of death row inmates which produces competency for execution. Perry insists that there is a national consensus opposing such medication. However, medication which induces competency for execution is entirely consistent with contemporary American standards regarding treatment of mentally ill prisoners.

This Court has held that the Eighth Amendment ban on cruel and unusual punishment is not limited to those penalties forbidden at the time the Bill of Rights was adopted.¹⁴ *Ford*, 477 U.S. at 406; *Gregg*, 428 U.S. at 171 (joint opinion of Stewart, Powell and Stevens, JJ.). Rather, the Eighth Amendment proscription extends to punishments which are contrary to "the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. Thus, where there is a national consensus against a particular punishment, this Court will find imposition of that punishment to be cruel and unusual in violation of the Eighth Amendment. *Stanford v. Kentucky*, ___ U.S. ___, 109 S.Ct. 2969 (1989); *Penry*, ___ U.S. ___, 109 S.Ct. 2934. In determining whether a national consensus exists, this Court looks to "objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S. at 173 (joint opinion of Stewart, Powell and Stevens, JJ.). In particular, the Court considers legislation

¹⁴Perry does not argue that involuntary medication to restore sanity for execution was prohibited at common law. Nor could he. Antipsychotic drugs were not available as a treatment for mental illness until this century. Kessler & Waletzky, *supra*, note 8, at 202; Haddox & Pollack, *Psychopharmaceutical Restoration to Present Sanity (Mental Competency to Stand Trial)*, 17 J. Forensic Sci. 568, 570-71 (1972).

to be "the primary and most reliable indication of consensus." *Stanford*, ___ U.S. at ___, 109 S.Ct. at 2977.

A review of state legislation reveals no "objective evidence . . . of an emerging national consensus," *Penry*, ___ U.S. at ___, 109 S.Ct. at 2955, against medication of death row inmates to produce competency for execution. No jurisdiction explicitly prohibits such medication. On the other hand, contrary to Perry's allegation that "[n]o state has passed legislation authorizing the use of medication to establish competency for execution," Brief for Petitioner at 40 (emphasis omitted), Maryland expressly allows medication of condemned prisoners to restore competency. See Appendix E. Moreover, of the 37 states which have enacted capital punishment, 24 (including Maryland) contemplate the use of medication to produce competency by specifically authorizing treatment of incompetent death row inmates or by providing that the execution of such inmates will be stayed or suspended *until competency is regained*.¹⁵ See Appendix F. The statutes of the remaining 13 death penalty states, including Louisiana, are silent on the issue of restoration of competency. However, these 13 states, as well as the 13 states and the District of Columbia which do not allow capital punishment, authorize involuntary treatment of prisoners and criminal defendants in other contexts.¹⁶ See Appendixes H and I. Thus, involuntary medication of prisoners is not, in and of itself, contrary to contemporary values.¹⁷ Moreover, at least twenty states statutorily provide that competency to stand trial may be achieved with medication. See Appendix J.

¹⁵In addition, three other states had similar provisions before outlawing capital punishment. See Appendix G.

¹⁶As evidence of a national consensus against involuntary medication of prisoners, Perry points this Court to a host of state statutes regarding the rights of civilly committed patients. Appendix to Brief for Petitioner, Chart 2. However, because prisoners do not necessarily possess the same rights enjoyed by those who have not been convicted of crimes, statutes governing treatment of civilly-committed patients are for the most part irrelevant to the issue of contemporary standards regarding treatment of prisoners.

¹⁷Indeed, 20 states authorize capital punishment by lethal injection. U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment* 1988, 5, Table 2 (1989).

Recently, in *Stanford v. Kentucky*, ___ U.S. ___, ___, 109 S.Ct. 2969, 2975-76 (1989), this Court held that a showing that 15 states forbid the execution of 16-year-old offenders and that 12 states forbid the execution of 17-year-old offenders did "not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual." Thus, in claiming that involuntary medication of prisoners to achieve competency for execution is prohibited by the Eighth Amendment, it is Perry's "heavy burden" . . . to establish a national consensus *against* it." *Id.* at ___, 109 S.Ct. at 2977 (citation omitted). As the above survey of state legislation demonstrates, Perry has failed to carry that burden. Not a single state has enacted legislation forbidding medication of prisoners to restore competency for execution. Moreover, such medication is *authorized* by the only state which has specifically addressed the issue by statute. Hence, "the clearest and most reliable objective evidence of contemporary values," *Penry*, ___ U.S. at ___, 109 S.Ct. at 2953, reveals absolutely no opposition to the use of medication to achieve competency for execution, much less a national consensus against such treatment. In short, medication of condemned prisoners to produce competency is not contrary to "evolving standards of decency."¹⁸

C. Nonconsensual treatment of death row inmates which produces competency for execution does not violate the Eighth Amendment prohibition of excessive punishment.

¹⁸Perry places great emphasis on the fact that the state court's order is not specifically authorized by state statute or by a decision of the state Supreme Court but rather is, as he phrases it, "the product of penological policy-making by a single trial judge." Brief for Petitioner at 37. That is beside the point. A particular punishment need not be explicitly sanctioned by statute or supreme court decision in order to be permissible under the Eighth Amendment. For example, in *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934 (1989), a mentally retarded murderer was sentenced to death; the sentence was not based on an explicit state authorization of capital punishment of mentally retarded murderers. Yet this Court refused to hold that execution of mentally retarded offenders violates the Eighth Amendment. Likewise, in this case, Louisiana's failure to expressly authorize the treatment at issue does not render that treatment violative of the Eighth Amendment.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), Justices Stewart, Powell and Stevens wrote that "public perceptions of standards of decency with respect to criminal sanctions are not conclusive [of the Eighth Amendment issue]. A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' . . . This means, at least, that the punishment not be 'excessive.'" *Id.* at 173 (joint opinion of Stewart, Powell and Stevens, JJ.) (citation omitted). "Under *Gregg*, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). See also *Stanford*, ___ U.S. ___, 109 S.Ct. 2969 (O'Connor, J., concurring in part and concurring in the judgment); *id.* (Brennan, J., dissenting); *Penry*, ___ U.S. ___, 109 S.Ct. 2934 (opinion of O'Connor, J.); *id.* (Brennan, J., concurring in part and dissenting in part). As explained below, medication of incompetent death row inmates is not only consistent with this nation's "evolving standards of decency," but it survives the excessiveness inquiry suggested by *Gregg*.¹⁹

There are two generally accepted purposes of the death penalty: retribution and deterrence. *Enmund v. Florida*, 458 U.S. 782 (1982). "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. . . . [C]ertain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg*, 428 U.S. at 183-84 (joint opinion of Stewart, Powell and Stevens, JJ.) (footnotes omitted). In addition, the death penalty can be in some cases an effective deterrent to potential capital offenders: "[t]here are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate." *Id.* at 186 (footnotes omitted).

¹⁹Perry does not expressly claim that involuntary medication to achieve competency for execution violates the Eighth Amendment proscription of excessive punishment. Nevertheless, because the basis for Perry's Eighth Amendment claim is not entirely clear, we address the excessiveness issue.

Medication of death row inmates which produces competency for execution significantly contributes to both goals of the death penalty. It is readily apparent that, if a condemned prisoner is shielded from execution by virtue of incompetency, the State cannot give effect to society's moral outrage at the prisoner's crime. Medication which restores competency and thereby allows execution of the death penalty thus satisfies the retributive goal of capital punishment. In addition, medication which induces competency enhances the deterrent effect of the death penalty by increasing the likelihood of execution. As loopholes to execution are narrowed or closed, the death penalty becomes a more certain punishment and hence a better deterrent. Thus, by limiting the effectiveness of mental illness as an escape hatch from execution, medication of incompetent death row inmates contributes to the penological goal of deterrence.

The second prong of the Eighth Amendment excessiveness inquiry requires evaluation of the proportionality of the punishment in relation to the seriousness of the offense. See *Solem v. Helm*, 463 U.S. 277 (1983). As Justices Stewart, Powell and Stevens explained in *Gregg*, "[t]here is no question that death as a punishment is unique in its severity and irrevocability." *Gregg*, 428 U.S. at 187 (joint opinion of Stewart, Powell and Stevens, JJ.). Yet capital punishment is not invariably disproportionate punishment for the crime of deliberate murder. *Id.* Assuming for the sake of argument that involuntary medication to achieve competency for execution increases the severity of a capital offender's punishment, such medication certainly does not constitute punishment that is so severe as to be disproportionate to the crime of premeditated murder, "the most extreme of crimes." *Id.* Murders which are "so grievous an affront to humanity," *id.* at 184, as to justify the ultimate penalty of death must likewise merit the relatively minor intrusion of nonconsensual medication.

In this case in particular, the "penalty" of involuntary medication is amply justified by Perry's cold-blooded murders of five members of his family. As described by the Louisiana Supreme Court, Perry's crimes were particularly egregious:

The offense was a shocking mass murder in a small town. Five members of defendant's family were killed on a Sunday morning, two as they slept in their beds. After killing his

parents, his cousins and a nephew, the defendant took money from his mother's belongings and from his father's pockets and fled the state in his father's car, taking refuge [sic] in a Washington hotel. He killed the adult victims in their own homes in a violent, bloody encounter which was deliberately planned. He waited for his parents more than an hour following his murder of his two cousins in a house just two doors away. A total of three weapons were used. The death penalty in such a case is proportionate to the offenses and to this particular defendant.

(J.A. 40-41). Obviously involuntary medication is not overly severe treatment for the criminal responsible for these crimes. The brutal slayings of five people, including a two-year-old child, merit the death penalty, even if carrying out that penalty requires treating Perry with medication to achieve his competency.

III. Perry has no Fourteenth Amendment right to refuse prescribed medication which will render him competent to be executed.

In addition to his Eighth Amendment argument, Perry contends that he is protected from unwanted medication by the Fourteenth Amendment. According to Perry, both the Due Process Clause and Louisiana law grant state prisoners a liberty interest in refusing antipsychotic medication. However, a sentence of death justifies restrictions on a condemned inmate's liberty which are necessary to carry out the death penalty; thus, a death row inmate who requires medication to be competent for execution is not entitled by the Fourteenth Amendment to refuse such medication. Moreover, Louisiana law does not create a constitutionally protected liberty interest in avoiding medication which is intended to produce competency for execution. Finally, even assuming that Perry has a liberty interest in refusing medication, that interest is overridden by the State's interest in effectuating the death penalty.

A. The imposition of a sentence of death extinguishes the right created by the Due Process Clause to refuse prescribed antipsychotic medication.

This Court has consistently recognized that prisoners do not retain the full range of liberty interests enjoyed by others. It is self-evident that a conviction and sentence of imprisonment necessarily extinguish the right to be free from confinement. Likewise, a

conviction and sentence of imprisonment justify restrictions on an inmate's freedom which are "ordinarily contemplated by a prison sentence." *Hewitt*, 459 U.S. at 468. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our prison system." *Price v. Johnston*, 334 U.S. 266, 285 (1948). Thus, this Court has held that prisoners do not enjoy constitutionally created rights to be free from administrative segregation, *Hewitt*, 459 U.S. 460, restrictions on visitation, *Thompson*, ___ U.S. ___, 109 S.Ct. 1904, interstate transfer from one prison to another, *Meachum v. Fano*, 427 U.S. 215 (1976), or transfer to an out-of-state prison, *Olim v. Wakinekona*, 461 U.S. 238 (1983). "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Montanye*, 427 U.S. at 242. See also *Vitek v. Jones*, 445 U.S. 480 (1980).

In *Washington v. Harper*, ___ U.S. ___, 110 S.Ct. 1028 (1990), this Court held that a Washington State prisoner had a liberty interest under the Due Process Clause of the Fourteenth Amendment in refusing medication with psychotropic drugs. The Court explicitly recognized, however, that "[t]he extent of a prisoner's right under the Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement." *Id.* at ___, 110 S.Ct. at 1037.

In this case, Perry's interest in refusing antipsychotic medication must be viewed in light of his sentence of death. Just as a sentence of imprisonment justifies conditions of confinement which are "within the sentence imposed," *Montanye*, 427 U.S. at 242, so does a sentence of death justify restrictions on liberty which are required to effectuate the death penalty. A sentence of death contemplates that the liberty interests of the condemned inmate will be restricted to the extent necessary to carry out that sentence. For example, a sentence of death by electrocution requires that the condemned prisoner be physically strapped to the electric chair; as a result, the constitutional liberty interest in freedom from bodily restraint, see *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982), is superseded by imposition of the death penalty.

The State cannot carry out Perry's sentence of death unless his competence to be executed is maintained with the use of antipsychotic drugs. Treatment of Perry with such medication is thus a necessary precondition to execution of Perry's sentence and is therefore "within the sentence imposed upon him." *Montanye*, 427 U.S. at 242. In short, the *Harper* right to be free from involuntary medication was extinguished by Perry's sentence of death.

B. Louisiana has not created a constitutionally protected liberty interest in avoiding medication intended to achieve competency for execution.

As previously noted, the decisions of this Court establish that "where a statute indicates with 'language of an unmistakable mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." *Ford*, 477 U.S. at 428 (O'Connor, J., concurring in the result in part and dissenting in part), *quoting Hewitt v. Helms*, 459 U.S. at 471-72. Perry maintains that Louisiana law creates a constitutionally protected right to refuse psychiatric treatment intended to achieve competency for execution. Specifically, Perry asserts that La. C.Cr.P. art. 648, La. R.S. 15:830.1, and La. R.S. 28:171(P) grant him a constitutionally protected liberty interest in avoiding the medication authorized by the state court. However, none of those statutes creates such a liberty interest.

La. C.Cr.P. art. 648, which is reproduced in Appendix B, provides that, when a criminal defendant is judicially determined to be incapable of standing trial, he shall be committed "to the custody of the Department of Health and Human Resources or a private institution approved by the court for custody, care, and treatment as long as the lack of capacity continues." La. C.Cr.P. art. 648A. The statute further provides that if, after commitment, the court finds that the defendant is not likely to become capable of standing trial, the defendant shall be released on probation or, if he is a danger to himself or others, civilly committed for treatment. La. C.Cr.P. art. 648B. Although Article 648 is addressed to determinations of capacity to proceed to trial, Perry submits that the Code articles governing claims of incompetency to stand trial, including Article 648, have been applied by the Louisiana Supreme Court in the post-conviction context. However, as explained *supra* at pages 18-19, only the

procedural requirements of La. C.Cr.P. arts. 641 *et seq.* have been extended to the post-conviction setting. Thus, any *substantive* right created by Article 648 is not available to Perry. More importantly, though, Article 648 plainly does not recognize a right to refuse treatment. In fact, the Article explicitly *requires* treatment to achieve competency. So, assuming for the sake of argument that Article 648 is fully applicable to post-conviction competency proceedings, it specifically authorizes the treatment ordered in this case.

La. R.S. 28:171(P) is likewise inapplicable here. Section 171, which is reproduced in Appendix C, is a declaration of the rights of patients in state treatment facilities for the mentally ill; it simply does not apply to treatment of prisoners on death row.²⁰ Assuming *arguendo* that the statute applies, it does not create a right to refuse the medication at issue in this case. La. R.S. 28:171(P) provides that "[n]o medication may be administered to a patient except upon the order of a physician. . . . Medication shall not be used for nonmedical reasons such as punishment or for convenience of the staff." Perry claims that this provision prohibits any medication which is not for "treatment." However, as explained *supra* at pages 29-30, the medication authorized by the state court is to "treat" Perry. So, if Section 171(P) establishes treatment as a "substantive predicate" absent which medication will not be ordered, that substantive predicate has been met.²¹

²⁰La. R.S. 28:2(28)(C) specifically excludes prisons and jails from the definition of "treatment facility." See Appendix C. Moreover, a reading of Section 171 in its entirety makes it crystal clear that it was not intended to apply to state prisoners. The Section grants patients the rights to "unimpeded, private and uncensored communication . . . by mail, telephone and visitation," La. R.S. 28:171(C), to "be employed at a useful occupation," La. R.S. 28:171(H), and to "wear [their] own clothes," La. R.S. 28:171(G). Certainly, the legislature did not intend to grant those rights to death row inmates.

²¹The mere fact that Perry's treatment also produces competency for execution is of no consequence. Section 171(P) cannot be read as prohibiting medically necessary treatment merely because the treatment also serves another purpose. Indeed, as discussed above, La. C.Cr.P. art. 648 explicitly requires treatment to produce competency to stand trial. Thus, Louisiana law does not categorically forbid the use of medically appropriate treatment to produce competency.

Unlike Article 648 and Section 171, La. R.S. 15:830.1, reproduced in Appendix D, does apply in the prison setting. That statute provides for involuntary treatment of a mentally ill prisoner for up to fifteen days when a prison physician or psychiatrist "certifies that the treatment is necessary to prevent harm or injury to the inmate or to others." La. R.S. 15:830.1A. Section 830.1 further provides that, when treatment for more than fifteen days "is deemed necessary," judicial proceedings shall be initiated to determine whether the inmate should be committed to a treatment facility for continued treatment. *Id.* The proceedings must "be in accord with all procedures required by law in the case of judicial commitment." La. R.S. 15:830.1C. Treatment of the prisoner must continue during pendency of the proceedings. La. R.S. 15:830.1A. Following a judicial hearing at which the prisoner is represented by counsel, "the court shall determine whether the inmate is competent and, if not, he shall order that appropriate treatment be provided." *Id.*

Section 830.1 does not create a constitutionally protected liberty interest because it does not contain "explicitly mandatory language" that nonconsensual medication "will not occur absent specified substantive predicates." *Hewitt*, 459 U.S. at 472. Section 830.1 provides that involuntary medication of a prisoner "will be permitted" if such treatment "is necessary to prevent harm or injury to the inmate or to others," La. R.S. 15:830.1A, but it does not *mandate* treatment under those circumstances. Thus, the statute "stop[s] short of requiring that a particular result is to be reached upon a finding that the substantive predicates are met." *Thompson*, ___ U.S. at ___, 109 S.Ct. at 1910 (footnote omitted). Moreover, Section 830.1 does not specify that involuntary medication is permitted *only* if necessary to prevent harm or injury. A finding that medication is necessary to prevent harm or injury is a *sufficient* condition for nonconsensual administration of neuroleptic medication, but it is not a *necessary* condition for that treatment. Perry cannot therefore "reasonably form an objective expectation" that he will not be medicated absent a finding that he poses a risk of harm or injury to himself or others. *Id.* at ___, 109 S.Ct. at 1911. In other words, even if Section 830.1 creates an expectation that an inmate *will* be medicated if necessary to prevent harm or injury, the statute does not create "a justifiable expectation on the part of the inmate that the drugs will *not*

be administered unless [that condition] exist[s]." *Harper*, ___ U.S. at ___, 110 S.Ct. at 1036 (emphasis added).²²

C. Even assuming that a death row inmate retains a liberty interest in being free from involuntary medication, such interest is outweighed by the State's interest in enforcing a validly imposed sentence of death.

In *Turner v. Safley*, ___ U.S. ___, ___, 107 S.Ct. 2254, 2261 (1987), this Court held that a prison regulation which interferes with prisoners' constitutional rights is valid as long as "it is reasonably related to legitimate penological interests." Although the *Turner* standard of review is stated in terms of prison "regulations," this Court has noted that the standard "applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Harper*, ___ U.S. at ___, 110 S.Ct. at 1038. Thus, even assuming that Perry retains a right to refuse medication under either the Due Process Clause or Louisiana law, the court order

²²Perry contends that Section 830.1 creates a constitutionally protected entitlement because it is "written in mandatory language." Brief for Petitioner at 42. Specifically, Perry points out the following language in Section 830.1: "If treatment for a longer period is deemed necessary, a *petition shall be filed* in a court of competent jurisdiction setting forth the reasons for the treatment. . . . After a hearing . . . , *the court shall determine* whether the inmate is competent and, if not, *he shall order* that appropriate treatment be provided." La. R.S. 15:830.1A (emphasis added). However, this language is not relevant to the issue of whether Section 830.1 creates a liberty interest in refusing medication. As explained by this Court in *Kentucky Department of Corrections v. Thompson*, ___ U.S. ___, ___ n.4, 109 S.Ct. 1904, 1910 n.4 (1989), "the mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found. The search is for *relevant* mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether [sic] an inmate may be deprived of the particular interest in question." The language relied on by Perry does not *require* that medication be ordered if an inmate poses a danger to himself or others; the quoted language comes into play only *after* an initial decision has been made to medicate the inmate for fifteen days. In addition, the quoted language does not prohibit medication under other circumstances. Thus, the language is "irrelevant mandatory language." *Id.* at ___ n.4, 109 S.Ct. at 1910-11 n.4.

authorizing nonconsensual medication to achieve Perry's competency to be executed is valid because it is reasonably related to the State's interest in carrying out the death penalty.

In *Harper*, this Court considered a constitutional challenge to a Washington prison regulation which provided for forcible treatment of mentally ill prisoners with prescribed antipsychotic drugs if the prisoners were found likely to harm themselves or others. While recognizing a constitutional liberty interest in refusing unwanted medication, the Court applied the *Turner* standard of review and upheld the regulation as reasonably related to legitimate penological interests. *Id.* In so holding, the Court considered three factors which the *Turner* decision identified as relevant to the determination of the reasonableness of a regulation:

'First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it.' 482 U.S., at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)). Second, a court must consider 'the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.' 482 U.S., at 90. Third, 'the absence of ready alternatives is evidence of the reasonableness of a prison regulation,' but this does not mean that prison officials 'have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint.' *Id.*, at 90-91; see also *Estate of Shabazz*, *supra*, at 350.

Id.

Consideration of the three *Turner* factors supports a conclusion that nonconsensual medication of a death row inmate to achieve competency for execution is constitutionally permissible. First, it is manifest that the State has a substantial interest in enforcing criminal sentences. See Brief for Petitioner at 44. The fundamental purposes of punishment, retribution and deterrence, cannot be served if criminal sentences are not carried out. In addition, as in *Harper*, the State has an interest in providing prisoners with treatment which is in their best medical interest. *Harper*, ___ U.S. at ___, 110 S.Ct. at 1039. The provision of medically prescribed treatment to a mentally ill prisoner to achieve his competency to be executed serves both of these State

interests. The medication makes it possible for the State to enforce a validly imposed death sentence. Moreover, "the fact that the medication must first be prescribed by a psychiatrist . . . ensures that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement." *Id.* at ___, 110 S.Ct. at 1037 (footnote omitted).

Second, under the circumstances, accommodation of the right to refuse medication would impose a significant burden on the prison system. Supervision and care of untreated mentally ill prisoners is considerably more difficult than supervision and care of mentally ill prisoners who are properly treated. As explained by the American Psychiatric Association and the Washington State Psychiatric Association, "[m]aintaining a significant number of unmedicated patients may impose considerable burdens on the staff in caring for the refusing prisoner and others whose treatment programs break down. These burdens, in turn, carry unfortunate consequences for recruiting and keeping staff of a consistently high quality." Brief for the American Psychiatric Association *et al.* at 21 n.17, *Harper*, ___ U.S. ___, 110 S.Ct. 1028. In addition, prohibition of involuntary medication would make claims of incompetency more inviting by granting incompetent prisoners an absolute reprieve from execution; such an approach would likely encourage death row inmates to feign incompetency. See *Ford*, 477 U.S. at 435 (Rehnquist, J., dissenting).

Third, when an incompetent death row inmate refuses treatment, there is *no* alternative to medication which will serve the State's interest in carrying out the inmate's sentence. The right to refuse medication is thus tantamount to the power to circumvent the death penalty. In this case, the evidence is undisputed that Perry will not remain competent for execution unless he is maintained on Haldol. Consequently, without the right to treat Perry, the State cannot enforce his sentence of death.

In sum, nonconsensual medication of Perry is reasonably related to the State's legitimate penological interest in enforcing the death penalty. Such medication is also reasonably related to the State's interest in providing Perry with treatment which is in his medical interest. As a result, the medication is permissible under the Fourteenth Amendment.

IV. The state court's conduct of adversarial hearings on the issue of competency, accompanied by the full panoply of attendant procedural protections, exceeded the requirements of the Due Process Clause of the Fourteenth Amendment.

Assuming *arguendo* that he has a protected interest in refusing medication, Perry has two liberty interests which were at stake in the post-conviction proceedings: the Eighth Amendment right to avoid execution during incompetency and the right to refuse medication. Both rights hinge on the determination of competency; if Perry is competent, he may be executed, and, if Perry is incompetent, he may be treated against his will with antipsychotic medication to achieve competency. The Due Process Clause thus requires that Perry be afforded procedures adequate to ensure that the competency determination is neither arbitrary nor erroneous.

This Court's decisions in *Ford* and *Harper* are instructive as to the procedures due Perry under the Fourteenth Amendment. In *Ford*, this Court held that the Florida procedure for determining competency for execution did not provide for a full and fair hearing under 28 U.S.C. §2254. Justice Marshall's plurality opinion identified three defects in the Florida scheme: "failure to include the prisoner in the truth-seeking process," 477 U.S. at 413, "denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions," *id.* at 415, and "placement of the decision wholly within the executive branch," *id.* at 416. While Justice Marshall indicated that "a full trial on the issue of sanity" is not necessary, he stressed that "the adversary presentation of relevant information [should] be as unrestricted as possible" and that "the manner of selecting and using the experts responsible for producing that 'evidence' [should] be conducive to the formation of neutral, sound, and professional judgments." *Id.* at 416-417. In a concurring opinion, Justice Powell noted that the issue of whether the state fact-finding procedure amounted to a full and fair hearing under 28 U.S.C. §2254 was identical to the procedural due process issue. *Id.* at 424 (Powell, J., concurring in part and concurring in the judgment). Although Justice Powell did not determine "the precise limits that due process imposes in this area," he stated that "the requirements of due process are not as elaborate as Justice Marshall suggests." *Id.* at 425, 427. He

concluded that, in general, only an impartial decisionmaker and an opportunity to be heard are constitutionally required. *Id.* at 427. Justice O'Connor, concurring in the result in part and dissenting in part, reasoned that "the Due Process Clause imposes few requirements on the States in this context." *Id.* at 429 (O'Connor, J., concurring in the result in part and dissenting in part). She nevertheless found the Florida procedure invalid because it failed to provide the prisoner with an opportunity to be heard. *Id.* at 430.

In the *Harper* case, as noted above, this Court considered a due process challenge to a Washington prison regulation providing for forcible medication of mentally ill prisoners who pose a danger to themselves or others. The challenged policy allowed nonconsensual medication of an inmate only after an adversary hearing before a special committee composed of a psychologist, a psychiatrist and the associate superintendent of the treatment facility. ____ U.S. at ____, 110 S.Ct. at 1033. The policy afforded the prisoner the rights to notice, attendance at the hearing, presentation of evidence, cross-examination of witnesses, assistance of a lay advisor and judicial review. *Id.* at ____, 110 S.Ct. at 1033-34. This Court upheld the policy's procedures as adequate under the Fourteenth Amendment. *Id.* at ____, 110 S.Ct. at 1040. Specifically, the Court rejected claims that due process requires a judicial decisionmaker, right to counsel, application of the rules of evidence, or proof by "clear, cogent and convincing" evidence. *Id.* at ____, 110 S.Ct. at 1042, 1044.

The procedures used by the state court in determining Perry's competency far exceeded the requirements of the *Harper* and *Ford* decisions. The competency determination was made by a judicial decisionmaker after adversary hearings and was subjected to appellate review. Perry was allowed to recommend appointments to the sanity commission, and his recommendations were honored. (R. 19; J.A. 46). Throughout the proceedings, Perry was represented by counsel. (J.A. 45-51). He was afforded the rights to be present at the hearings (J.A. 47, 50), to testify in his behalf (J.A. 95-97), to cross-examine witnesses (*see, e.g.*, R. 722), to compel production of documents (J.A. 46), to videotape the proceedings (J.A. 47), to present evidence (J.A. 125; R. 539-40, 542-45), and to submit written memoranda and oral argument (*see, e.g.*, R. 691, 763, 766). In short, the state court conducted a full-scale competency trial; it is

inconceivable that due process requires more.

Perry nevertheless asserts that the competency proceedings were constitutionally deficient in two respects. First, he complains that the court admitted into evidence the documents submitted by the Department of Public Safety and Corrections. (J.A. 99-106). According to Perry, because the documents were submitted *ex parte* and contain hearsay, their consideration by the court amounts to a denial of due process. Second, Perry insists that his due process rights were violated because the trial court failed to comply with procedures required by Louisiana law. Both of these complaints are meritless.

In *Harper*, this Court rejected an argument that a pre-hearing meeting between the special committee and the treatment facility staff, conducted without the inmate's presence, violated due process. The Court explained that "[a]bsent evidence of resulting bias, or evidence that the actual decision is made before the hearing, allowing [the inmate] to contest the [state's] position at the hearing satisfies the requirement that the opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Harper*, ___ U.S. at ___, 110 S.Ct. at 1044 (citation omitted). Similarly, in this case, Perry cannot show that he was prejudiced by the *ex parte* submission of the challenged documents. The documents were submitted to the court in early June of 1988. (J.A. 99). By the end of that month, at the latest, Perry's counsel was aware of the Department's submission of the documents. (R. 194-97). In August of 1988, the court ordered the documents admitted into evidence. (J.A. 48). Subsequently, the court conducted two evidentiary hearings at which Perry had the opportunity to contest the evidence. Indeed, at the conclusion of the October hearing, the Court specifically offered Perry's counsel the opportunity to present evidence. (J.A. 125). Under the circumstances, Perry cannot claim that he was prejudiced, or even inconvenienced, by the short delay in notifying him of the documents' submission. Perry simply cannot now complain because he neglected to refute record evidence of which he was aware for several months.

Perry's objection to the hearsay nature of the evidence is likewise unfounded. Perry points to no authority for the proposition that the hearsay prohibition is constitutionally required in competency proceedings. Neither *Ford* nor *Harper* suggests such a

requirement. In *Harper*, this Court explicitly rejected the argument that application of the rules of evidence was constitutionally required. ___ U.S. at ___, 110 S.Ct. at 1044. In addition, the plurality opinion in *Ford* stressed that "the adversary presentation of relevant information [should] be as unrestricted as possible." 477 U.S. at 417. Certainly, Perry cannot claim that the documents in question were not relevant. Moreover, given the medical nature of the competency determination, the inmate's interests are better protected by considering "the realities of frequent and ongoing clinical observation by medical professionals," *Harper*, ___ U.S. at ___, 110 S.Ct. at 1042, than by formal adherence to the rules of evidence. In fact, Perry himself offered six volumes of hearsay medical records at the first hearing. (R. 539-40). Finally, because Perry was given an unfettered opportunity to contest the evidence, he cannot assert that he was prejudiced by its admission.

Perry's second complaint is that the state court failed to comply with procedures required by Louisiana law. However, Perry does not identify any specific deficiencies in the state court procedure. Moreover, a state's failure to follow its own procedures is not a violation of due process; "an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Olim*, 461 U.S. at 250 n.12. This Court rejected an identical argument in *Olim v. Wakinekona*, 461 U.S. 238 (1983):

Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement. . . . The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.

Id. at 250-51 (footnote and citations omitted). See also *Hewitt*, 459 U.S. 460. Thus, the State's compliance or noncompliance with its own procedural requirements is irrelevant to the constitutional issues before this Court.

CONCLUSION

For the foregoing reasons, the judgment of the Louisiana Supreme Court should be affirmed.

Respectfully submitted,

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Attorney General

RENE I. SALOMON*
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Counsel for Respondent

*Counsel of Record

APPENDIXES

APPENDIXES

APPENDIX A	Excerpts From Record
APPENDIX B	Louisiana Code of Criminal Procedure, Title XXI, Chapter 1, "Mental Incapacity to Proceed"
APPENDIX C	Louisiana Revised Statutes, Title 28, Sections 2 and 171
APPENDIX D	Louisiana Revised Statutes, Title 15, Section 830.1
APPENDIX E	State Which Expressly Authorizes Medication to Achieve Competency for Execution
APPENDIX F	States Which Authorize Treatment or Stay or Suspend Execution Until Competency Is Regained
APPENDIX G	Former Death Penalty States Which Stayed or Suspended Execution Until Competency Was Regained
APPENDIX H	Death Penalty States Which Involuntarily Treat Criminal Defendants in Other Contexts
APPENDIX I	Non-Death Penalty Jurisdictions Which Involuntarily Treat Criminal Defendants in Other Contexts
APPENDIX J	States Which Statutorily Provide That Competency to Stand Trial May Be Achieved Through Treatment

APPENDIX A**EXCERPTS FROM RECORD****LETTER TO JUDGE HYMEL FROM****KEITH B. NORDYKE****[RECORD—P. 19]****Nordyke and Denlinger***Attorneys at Law*

228 Napoleon

Baton Rouge, Louisiana 70802

Keith B. Nordyke

June E. Denlinger

Telephone

(504) 383-1601

Mailing Address

P. O. Box 237

Baton Rouge, LA 70821

January 20, 1988

The Honorable L. J. Hymel, Judge

19th Judicial District Court

Parish of East Baton Rouge

222 St. Louis Street

Baton Rouge, LA 70801

Re: *State of Louisiana v. Michael Owen Perry*

Dear Judge Hymel:

You have asked the defense to submit names of persons who the defense would like to nominate to the sanity commission in the above captioned. To that end, the defense would nominate as a psychiatrist qualified to serve on the sanity commission Dr. Glen Estes, Suite 3, 4521 Jamestown Avenue, Baton Rouge, Louisiana, telephone (504) 927-3062.

As I stated in open court, Dr. Curtis Vincent, a psychologist practicing in Baton Rouge, did extensive workups on Mr. Perry while Michael was at Feliciana Forensic Facility. As the 1987 legislature amended the Code of Criminal Procedure to allow psychologists to sit on sanity commissions I think it would be appropriate for Dr. Curtis Vincent to be appointed especially in light of his familiarity with this case. I therefore nominate as the psychologist member of this panel

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Dr. Curtis Vincent, 5000 Constitution Avenue, Baton Rouge, Louisiana, telephone (504) 928-6460.

Please advise if there is anything further that we can do to assist the court in this regard.

Very truly yours,

NORDYKE AND DENLINGER

/s/ Keith B. Nordyke

KEITH B. NORDYKE

* * *

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**EXCERPT FROM MEMORANDUM IN SUPPORT OF
STATE'S MOTION TO DISQUALIFY
KEITH NORDYKE AS COUNSEL OF RECORD IN
THESE PROCEEDINGS AND AS "DO-GOODER" FOR
MICHAEL OWEN PERRY**

[RECORD—P. 91]

* * *

The State * * * did not receive from defense counsel, a copy of Mr. Nordyke's March 14, 1988 letter (attached as App. F) to the Warden of the Louisiana State Penitentiary. Mr. Nordyke's letter instructed the warden to discontinue, the administering of any and all psychotropic medication to Michael Owen Perry: including but not limited to the medication ordered by medical doctors under whose care Michael Perry was placed.

* * *

[RECORD—P. 184]
Nordyke and Denlinger
Attorneys at Law
 228 Napoleon
 Baton Rouge, Louisiana 70802

Keith B. Nordyke
 June E. Denlinger

Telephone
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 Mailing Address
 P. O. Box 237
 Baton Rouge, LA 70821

March 14, 1988

Warden
 Angola State Penitentiary
 Angola, LA 70775

Re: Michael Owen Perry
 (Death Row)

Dear Warden:

...

Pursuant to that decision making authority that has been delegated to me, I hereby request that Michael Owen Perry be removed from any and all psychotropic medication including but not limited to Haldol and Prolixin, which may currently be administered to Mr. Perry. This medication shall not be given to Mr. Perry until such time as I specifically concur or of course, a court orders otherwise. Mr. Perry is totally incompetent and unable to make decisions on his own behalf. He is currently undergoing evaluation by numerous doctors. I deem it in Mr. Perry's best interests not to be taking medication at this point in time. I have carboned a copy of this letter to the hospital at Angola and request that same be placed clearly in Mr. Perry's chart.

...

[RECORD—P. 186]

...

EX PARTE MOTION FOR DELEGATION OF DECISION MAKING AUTHORITY

NOW INTO COURT, through undersigned counsel, comes Michael Owen Perry, an incompetent death row inmate, who respectfully suggests to the Court through his undersigned counsel the following:

1.

Undersigned counsel visited with Perry on January 6, 1988, at the hospital at Louisiana State Penitentiary. Michael was blatantly psychotic, unable to articulate any facts regarding his case cogently and was completely incapable of making decisions on his own behalf.

2.

It is anticipated during the course of the representation of Mr. Perry for purposes of the "Perry Motion" that there will be certain issues raised, such as the ability to waive the attorney client privilege, whether to abandon defenses or not, and whether or not Perry himself should be an exhibit or attempt to testify. Counsel believes Perry to be totally incapable of making these decisions for himself.

3.

On January 15, 1988, undersigned counsel contacted Mr. Tom Collins, executive counsel of the Louisiana State Bar Association, in an attempt to obtain ethical guidance and in particular, interpretation of Rule 1.14 of the Louisiana Code of Professional Responsibility. Rule 1.14 (copy attached) asserts that the attorney must "take other protective action as may appear appropriate under the circumstances" [when his client is under a disability and unable to make decisions]. Mr. Collins stated that the committee would not be able to provide an ethical opinion or guidance on this issue and that counsel should proceed under existing procedural or substantive law.

[RECORD—P. 187] 4.

Although Rule 1.14 suggests the possibility of a curator, it is clear that that portion of Rule 1.14 is dealing with civil matters. Counsel does not believe there is any authority for a curator to make decisions

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in criminal cases on behalf of his client and further, does not believe that such decisions should or can be made by a curator.

5.

It is anticipated that expert psychiatric testimony in this cause will show that the decision making processes of the defendant are so impaired as to render them completely unreliable.

6.

Counsel represents to the Court that there are no close family relatives available to appoint to make decisions on behalf of Mr. Perry and further, even if such relatives were available, they would not be eligible for appointment due to the nature of the crime accused in this matter.

7.

Counsel desires to undertake to make these decisions on behalf of Mr. Perry, keeping Mr. Perry's best interests at heart at all times, in order that adequate representation might be given. Other than "a Motion to Appoint a DoGooder" counsel knows of no other method to adequately protect Mr. Perry's rights and to competently and timely exercise the decision making that must be done in this case.

8.

Movers desire that this motion be kept under seal and that any hearing held in this matter be held in chambers ex parte.

9.

Counsel certifies that they have read the appropriate rules of professional responsibility and there is no guidance other than what is attached.

10.

In the alternative, mover desires that an experienced criminal lawyer, who has practiced in the field of death penalty [RECORD—P. 188] defense, be appointed to make decisions on behalf of Michael Owen Perry and undersigned counsel would be happy to provide the Court with a list of such persons in the Baton Rouge area.

WHEREFORE, MOVER PRAYS that after due proceedings had, there be a hearing in chambers, ex parte, and any record thereof be kept under seal, and that Michael Owen Perry be allowed to make de-

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cisions through counsel or by a representative to be appointed from the Criminal Bar of the City of Baton Rouge who has experience in death penalty defense.

MOVER FURTHER PRAYS for a general and equitable relief as may be allowed by law.

BY ATTORNEYS:

/s/ June E. Denlinger
KEITH B. NORDYKE
JUNE E. DENLINGER
228 Napoleon
Baton Rouge, LA 70802
Phone: (504) 383-1601

* * *

**LETTER TO JUDGE HYMEL FROM
KEITH B. NORDYKE**

[RECORD—P. 193]

Nordyke and Denlinger

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June 22, 1988

Honorable L. J. Hymel
Judge
19th Judicial District Court
222 St. Louis Street
Baton Rouge, Louisiana 70801

Re: *State of Louisiana v. Michael Owen Perry*
Number: 9-85-472

Dear Judge Hymel:

I enclose herewith an objection to additional evidence which has been attached to various state briefs in this matter. I understand Your Honor does not want this matter being set for hearing therefore, we would appreciate this objection being filed into the record so that our rights for appellate review are reserved if necessary.

Thanking you for your cooperation and attention, we remain

Very truly yours,

NORDYKE AND DENLINGER
/s/Keith B. Nordyke
KEITH B. NORDYKE

* * *

[RECORD—P. 194]

* * *

**OBJECTION TO AMICUS BRIEF AND OBJECTION TO
INTRODUCTION OF ADDITIONAL EVIDENCE**

NOW INTO COURT, through undersigned counsel, comes Michael Owen Perry who respectfully objects to the filing of an amicus brief by the State of Louisiana and to the objection of additional evidence for reasons set forth below:

1.

Mover would object to the amicus brief filed on behalf of the State of Louisiana (Department of Corrections) for the reason that the Department of Corrections has no interest in this matter and no cognizable standing to file an amicus brief. Further, Michael Owen Perry perceives an amicus brief by *the state* as merely an attempt to get a "second bite of the apple". There is no showing anywhere that the Attorney General's office is not sufficiently motivated or prepared to handle this case. In other words, it seems that "the state is the state" and that an additional opportunity to file a brief is being given the state by use of an amicus brief.

2.

Attached to the amicus brief and further, attached to the state's original memorandum in this matter, is evidence adduced after the trial of this matter held in April, 1988. Michael Owen Perry vigorously objects to the introduction of this evidence for numerous reasons including but not limited to the following:

1. The evidence is hearsay;
2. The evidence was not taken subject to cross examination
3. The evidence purports to be opinion testimony however no qualification of the expert has been had, and Michael Owen Perry believes that the physicians in this matter are the best experts.
4. Michael Owen Perry has been denied due process as defined in *Ford v. Wainwright* in that the introduction of this evidence completely denies Michael Owen Perry an opportunity to respond and to be heard.
5. Any evidence obtained from Michael Owen Perry in addition to being uncross-examined, was in violation of his right to coun-

sel in that said evidence was taken [RECORD—P. 195] from Michael Owen Perry while he was either incompetent or without the advice of his counsel and certainly without the knowledge of his counsel both in violation of the Fifth and Sixth Amendments to the United States Constitution.

3.

For the above and foregoing reasons and based on the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the Louisiana Constitution plaintiff objects to the introduction of any additional evidence.

WHEREFORE MOVER PRAYS that all evidence filed and not connected with the trial of this matter and subsequent to the trial of this matter be stricken and not considered.

BY ATTORNEYS:

/s/ Keith B. Nordyke
KEITH B. NORDYKE
NORDYKE AND DENLINGER
P. O. Box 237
Baton Rouge, Louisiana 70821
Telephone: (504) 383-1601

* * *

[RECORD—P. 196]

* * *

OBJECTION TO INTRODUCTION OF ADDITIONAL EVIDENCE

NOW INTO COURT, through undersigned counsel, comes Michael Owen Perry who objects to the introduction of evidence subsequent to the close of the hearing for reasons set forth below:

1.

Mover understands however has not been favored with a service copy of certain evidence which has been forwarded to the trial court in this matter subsequent to the close of the hearing on April 20, 1988.

2.

In particular, mover has been made aware of a June 7, 1988 letter from Annette Viator, attorney for the Department of Corrections, to the Honorable L. J. Hymel, forwarding certain documentation from the Louisiana State Penitentiary to the trial court.

3.

Furthermore, these documents, which are not introduced into evidence, and have not been subjected to cross examination had been attached to the state's brief in this cause.

4.

The aforereferenced June 7, 1988 letter indicates that a physician at Louisiana State Penitentiary will be following up with weekly reports to Your Honor and mover would respectfully and vigorously object to this procedure as evidence has been taken in this matter and the case has been taken under advisement.

5.

This procedure completely and totally violates defendants rights in this cause as these witnesses were not called by the State of Louisiana at the hearing in this matter (when the state [RECORD—P. 197] had total opportunity to do so) and these documents attempting to be introduced in this fashion solely in an effort to circumvent cross examination and normal evidentiary procedure.

6.

The aforereferenced procedure is violative of Michael Owen Perry's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as all Louisiana corresponding constitutional provisions in that the documents submitted in the aforereferenced fashion have not been tested by cross examination, have not been subjected to scrutiny by counsel, have not been served upon counsel, afford no notice and opportunity to be heard and appear to be derived from Michael Owen Perry without the benefit and advice of counsel.

WHEREFORE MOVER PRAYS that after due proceedings had mover prays that the State of Louisiana be prohibited from introducing any further evidence after 20 April 1988 and further, that all such documentation submitted after 20 April 1988 be stricken from the record.

MOVER FURTHER PRAYS that the State of Louisiana be ordered and prohibited from further attempts at providing documentation to this Court without:

- a. Forwarding a copy to opposing counsel.
- b. Noticing a hearing and producing the witnesses and the opportunity to be heard.

BY ATTORNEYS:

/s/ Keith B. Nordyke
 KEITH B. NORDYKE
 NORDYKE AND DENLINGER
 P. O. Box 237
 Baton Rouge, Louisiana 70821
 Telephone: (504) 383-1601

**LETTER TO ANNETTE VIATOR FROM
 KEITH B. NORDYKE**

[RECORD—P. 204]

Nordyke and Denlinger

Attorneys at Law

228 Napoleon

Baton Rouge, Louisiana 70802

Keith B. Nordyke
 June E. Denlinger

Telephone
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 Mailing Address
 P. O. Box 237
 Baton Rouge, LA 70821

June 22, 1988

Ms. Annette Viator
 Department of Corrections
 P. O. Box 943-4
 Baton Rouge, Louisiana 70804

Re: Michael Owen Perry

Dear Annette:

* * *

As attorney for Michael Owen Perry I would respectfully request at this time that all medication to Michael Owen Perry be discontinued until such time as the state has complied with the statutory procedures set forth in Title 15 of the Louisiana Revised Statutes.

* * *

[RECORD—P. 305]
Supreme Court
STATE OF LOUISIANA
New Orleans

Chief Justice
 John A. Dixon, Jr.

Associate Justices
 Pascal F. Calogero, Jr.
 Walter F. Marcus, Jr.
 James L. Dennis
 Jack Crozier Watson
 Harry T. Lemmon
 Luther F. Cole

Clerk of Court
 Frans J. Labranche, Jr. 301 Loyola Ave., 70112
 Telephone 504-568-5707

August 29, 1988

Hon. L. J. Hymel
 Judge, 19th Judicial District Court
 222 St. Louis St.
 Baton Rouge, LA 70801

Re: No. 88-KD-2239
State of Louisiana vs. Michael Owen Perry

Dear Judge Hymel:

This is to advise that the Court took the following action, this date, in the above entitled matter:

"The order of the trial judge dated August 26, 1988 in the minutes of court requiring forced medication of defendant pending the hearing on September 30, 1988 is stayed pending orders of this Court."

With kindest regards, I remain,

Very truly yours,

/s/ Frans J. Labranche, Jr.
 FRANS J. LABRANCHE, JR.
 Clerk of Court
 * * *

[RECORD—P. 314]
Supreme Court
STATE OF LOUISIANA
New Orleans

Chief Justice
 John A. Dixon, Jr.

Associate Justices
 Pascal F. Calogero, Jr.
 Walter F. Marcus, Jr.
 James L. Dennis
 Jack Crozier Watson
 Harry T. Lemmon
 Luther E. Cole

Clerk of Court
 Frans J. Labranche, Jr. 301 Loyola Ave., 70112
 Telephone 504-568-5707

September 23, 1988

Hon. L. J. Hymel
 Judge 19th JDC
 222 St. Louis Street
 Baton Rouge, La. 70801

In Re: *State of Louisiana vs. Michael Owen Perry*
 No. 88-KD-2239

Dear Judge Hymel:

This is to advise that the Court took the following action on September 22, 1988 with regards to the above entitled matter:

"Relator's motion to stay the September 30, 1988 hearing is denied."

With kindest regards, I remain,

Very truly yours,

/s/ Frans J. Labranche, Jr.
 FRANS J. LABRANCHE, JR.
 Clerk of Court
 * * *

**EXCERPTS FROM SANITY HEARING HELD
APRIL 20, 1988**

[RECORD—P. 505]

* * *

MR. NORDYKE: Dr. Jimenez, if you will please take the stand so we can get you out of here.

* * *

[RECORD—P. 509] [EXAMINATION OF DR. THERESITA JIMENEZ]

* * *

Q Dr. Jimenez, you were appointed by Judge Hymel to examine Mr. Michael Owen Perry, were you not?

A Yes, sir.

Q And, of course, you're familiar with Mr. Perry because you were, I believe, his treating physician in the Feliciana Forensic in '83 and '84?

A That's right, sir.

Q And I believe you were also the medical director or the psychiatric director of Feliciana Forensic during those years, were you not?

A Yes, sir.

Q Okay. And on February 4th of 1988 I believe you went to Louisiana State Penitentiary at Angola and evaluated Mr. Perry, is that correct?

A Yes, sir.

* * *

[RECORD—P. 511] I feel that Mr. Perry will become competent with the proper medication adjustment. He does understand that he is convicted and also expressed that he does not want to die.

Q What facts went into that opinion, doctor?

A When I went to see Mr. Perry that day he was fairly cooperative but he was evasive with the type of answers and mood that he was in. He indicated at the first part of the interview that he didn't kill the people that were killed, that somebody else did it. At a later part of the

interview he accepted that he did it because he had a lot of anger towards his mother. So the information he was giving at that point was rather inconsistent. He also talked about his lawyer had not defended him very well because he was a member of the Mafia. And he was very inconsistent with information that he was giving. He was—I also felt at that time that if we could readjust the medication that we would be able to get him much better.

Q I believe you've diagnosed Mr. Perry as having Schizoaffective Disorder, is that correct?

A That's correct, sir.

Q Would you please tell the judge what Schizoaffective Disorder is and what the symptoms of Schizoaffective Disorder may be, including the bipolar nature and that sort of thing?

A Schizoaffective Disorder is an illness wherein the patient has a problem with thinking disorder and at the same time also a problem with his feeling tone or the defective [sic] component. When they are in the state of acute illness they **[RECORD—P. 512]** usually are very manic if they are in a manic phase and very paranoid. Now if they are also in the depressed state they could be very withdrawn and would manifesting symptoms like not wanting to sleep, not wanting to talk or having crying adversity. The problem is also that they would have some distortion in their thinking and that would be the Schizophrenic component of the illness.

* * *

[RECORD—P. 513] Q Dr. Jimenez, my first interest is you have previously, have you not, diagnosed Michael Perry as being Schizoaffective Disorder?

A Yes, sir, I did.

Q And do you classify that as a major mental illness?

A Yes, sir.

Q Okay. And can that be acute at times and disappear and fade out at other times?

A The symptoms would get better at some point but the illness would be there. It has to be controlled by medication.

* * *

[RECORD—P. 514] Q All right. Now you mentioned that this is a thinking disorder. Can you give me some examples of how this thinking disorder would affect any one of us? I mean how would it make our lives different having a thinking disorder labeled as you have Schizoaffective Disorder?

A Well, if you have problems with thinking disorder there are times wherein you would not be in touch with reality when you are acutely ill, and there are times when you would feel like people are out to get you or people are out against you. And that would be the paranoid component of the illness. And . . .

Q And if—go ahead.

A Sometimes you would think that you are somebody that you really are not. And that's like when you think you are God.

Q Okay. Now if you think people are out to get you when they're not is there a label that psychiatrists attach to that phenomena?

A Paranoia.

Q And do you conclude that paranoia is an element of a Schizoaffective Disorder?

A It's a part of the problem but some people can also be paranoid without being Schizophrenic.

* * *

[RECORD—P. 515] A * * * Sometimes, also, he rambles. His thinking is not cohesive. He would go from one topic to the other and there is very loose association.

Q Did you say good or bad association or disassociation?

A Loose, loose.

Q Loose associations. And how do you determine a loose association?

A A loose association, uh, you would note when you are talking to a person and the answers that they give you are—or when they give you information there is no cohesiveness or they just don't stick together.

* * *

[RECORD—P. 518] BY THE COURT:

Q Dr. Jimenez, while you're looking for that, when you examined him on February 4th of this year at my request do you know whether or not Mr. Perry was on medication then?

A Yes, sir, he was on medication, a small amount of medication, but he was not taking it regularly.

Q What type of medication and what dosages?

A Haldol, and I think he was taking ten milligrams of Haldol.

Q Is that a daily prescription?

A Yes, sir, he had often times refused it. In fact, at that time that I saw him I think he was just restarted or he had just started agreeing to take the medicine.

Q What kind of drug is Haldol and what is its purpose and what does it do and what affect, in your opinion, did it [RECORD—P. 519] have and does it have on Michael Owen Perry?

A It's a psychotropic medication. It's supposed to get the thinking process more delusiveness, more cohesive, less paranoia, and get him to be able to concentrate and participate in the interviews, make him less paranoid. It's supposed to help his illness get better. That's the purpose of keeping him on the medication. At one time he was also tried on Lithium Carbonate but he did not do too well and he developed too many side effects so that was discontinued.

* * *

Q Do you know of your own knowledge or have you reviewed the report showing when he was placed on the Haldol?

A I was the one who started that on him back when he—when he first arrived he was doing well. And at that time I didn't feel that he was having any mental illness because he was really—other than being hostile and uncooperative [RECORD—P. 520] at that time. We did not then put him on any medication, really just tried to observe him and referred him for some testing which was done. And then his behavior became worse and he was very hard to deal with and he was causing a lot of—making a lot of threats so he was started on medication. He did better after that but then we had problems also with the side effects so we pretty much had to readjust his medicine regularly and watch him closely. He also has a problem about wanting to take

medication. He really never was interested in taking medication.

* * *

[RECORD—P. 534] Q Dr. Jimenez, does Mr. Perry have a different diagnosis or prognosis after your February 4th, 1988 interview as opposed to your interviews and observations prior to trial? Have you detected any different symptoms in your February 4th, 1988 interview as opposed to what you observed and saw prior to his trial?

A No, sir.

* * *

[RECORD—P. 539] MR. NORDYKE: Now that we're back on record, Your Honor, in connection with this proceeding I would offer, introduce and file into evidence, into evidence as Exhibits Two, Three and Four various medical records, the originals of which I'll be putting into evidence, copies of which I have provided to everybody, including the physicians in this case in bound format.

THE COURT: Which volumes [RECORD—P. 540] are those?

MR. NORDYKE: It varies. Exhibit Two, Your Honor, corresponds with volume six. This is the Lake Charles Mental Health records.

* * *

[RECORD—P. 542] THE COURT: Let it [Exhibit Two] be filed.

* * *

[RECORD—P. 543] THE COURT: Which are the Feliciana Forensic documents. The Court will allow them [Exhibit 3] to be filed as such.

* * *

[RECORD—P. 544] THE COURT: Let them [Exhibit 4] be filed as marked.

* * *

MR. NORDYKE: And, D-5 will be the Angola records

* * *

[RECORD—P. 545] THE COURT: Let that be filed as Exhibit Five.

MR. NORDYKE: And we will supplement the record with that at

the next break. We will call Dr. Aris Cox, please.

* * *

[RECORD—P. 546] [EXAMINATION OF DR. ARIS COX]

Q You are one of Mr. Perry's treating psychologists at Angola, are you not?

A No. I'm his treating psychologist [sic] at Angola, yes.

* * *

[RECORD—P. 552] A I have not noticed him to have any symptoms of tardive dyskinesia.

* * *

[RECORD—P. 553] A Well, there are medicines that can be given for side effects that improve the extra-paramental symptoms, and also discontinuing neuroleptic medication can prevent it.

* * *

A I have seen him on and off medication several times now and I have seen him respond to medication. When I saw him [RECORD—P. 554] back on the 3rd of March he looked about as good to me then as I've ever seen him look. At that time I thought he probably was competent. He deteriorates quickly when off medication. So his competency status tends to change, it's very labile, it moves about. What I meant by this perhaps offhand remark was that his competency changes frequently and he's not in the same place all the time. And sometimes he's competent and sometimes he's not. That's what I meant by that.

* * *

BY THE COURT:

Q Who made the decision, it you know, to place him on Haldol?

A One of the other psychiatrists there, a Dr. Jalisonne, and Dr. Montero has seen him also and they had put him on the medication.

* * *

Q * * * But my question is do you agree with [RECORD—P. 555] their . . .

A That treatment is a rational appropriate treatment for the psychiatric illness that this man has, in my opinion.

Q And does Haldol affect him beneficially?

A Yes, sir, when he takes it in adequate doses it affects him beneficially.

Q What is an adequate dose, in your opinion?

A Thirty milligrams a day, or more.

[RECORD—P. 559] Q *** Could you give me your definition of Schizoeffective Disorder, please?

A It is a psychotic illness characterized by a mixture of symptoms which include mood swings, disorganized thought processes, and certain other symptoms, such as, fixed false beliefs, such as, delusions, response to non-existent stimuli, such as, hallucinations, and disorganized thinking.

Q You used another word on me in your definition that I want you to define for me and that is psychotic illness.

A Well, psychotic illness is generally accepted as being an impairment of mental functioning to such an extent that the person is unable to meet the ordinary demands of life, I believe the AMA says. And, also, that there specifically is meant that there contact or appreciation of external reality is impaired. They hear things that aren't there, they see things that aren't there, they misinterpret what goes on around them.

[RECORD—P. 561] A To me, the changes that have occurred in him, his response to medication has been valuable to me in reaching conclusions about him.

Q Explain to me why.

A Because he gets better when he takes medication and he gets worse when he doesn't. And I think this is indicative of the fact that he has a process going on that responds to the medication. And, secondly, I think argues against the fact that he's malingering because in my experience people who malingering tend to do it whether they're on medication or not.

[RECORD—P. 567] Q Now you mentioned to me also that there was neuroleptic medication?

A Yes, sir.

Q Could you give me a definition for that?

A Neuroleptic medications such as Haldol is the name applied to these medications which are given to people for certain psychiatric illnesses, and they basically suppress, control, or improve the symptoms of the illness.

Q Okay. And what illness is the specific case Mr. Perry endures?

A He's being given this drug because he has a diagnosis of [RECORD—P. 568] Schizoeffective Disorder.

Q And this neuroleptic drugs will suppress what particular symptoms of Schizoeffective Disorder?

A Makes his thinking become coherent and rational, it makes his delusional beliefs either go away or become much less compelling or controlling. If he's hallucinating it will suppress or cease the hallucinations, will make him less labile and agitated.

Q Okay, so you told me he would become passive, it will reduce his delusions . . .

A Not passive, but he will . . .

Q Less hostile?

A Less hostile, less aggressive, less bouncing around off the wall.

Q All right, so, what else do we have besides less hostile, and no delusions or reducing . . .

A Thinking more coherently, and more in contact with his environment.

Q More coherently means what?

A Well, more coherent means that he could sit down and give me—I could ask him a question and he can develop an answer and explain an answer to me in a logical fashion, carry out a discussion with me and string together three or four or five thoughts or concepts in a logical sequence that makes sense. If, for example, I ask him, for ex-

ample, tell me what happened when you were in the hospital last week, he's able to sit down and tell me what was going on, why they took him to the hospital, how long he was there, etcetera, etcetera, in a coherent fashion. When he's not on medication he rambles so that he goes from talking about the hospital to something that happened before he ever came to Angola, [RECORD—P. 569] to something else that is completely unrelated.

* * *

[RECORD—P. 571] A We were discussing the issue of the man's competency and I said it has to do with whether or not he's on medication or not. When he's on medication I think he's competent, when he's not I don't think he is. And he [Mr. Nordyke] was aware that Michael was being given medication at Angola and he was taking it. And he indicated to me the he was going to advise him to quit taking it or see to it that he stopped taking it.

* * *

[RECORD—P. 573] A Is a specific motor—there's two specific motor pathways in the nervous system, the parameatal and the extra-parameatal motor systems. They control motor movement and coordination. These drugs have affects on so-called extra-parameatal system and produce certain movement disorders in patients.

Q Extra-parameatal . . .

A Parameatal.

Q . . . parameatal means controlling motor movement?

A Yes.

Q And how does that relate to Mr. Perry?

A Well, it relates to Mr. Perry that he develops sometimes these symptoms when he is taking Haldol. These symptoms are a recognized side effect of this class of drug.

* * *

[RECORD—P. 574] A Do I think he has tardive dyskinesia now?

Q Yes.

A No, I do not think he has it now.

* * *

[RECORD—P. 579] MR. NORDYKE: Dr. Curtis Vincent, please.

* * *

[RECORD—P. 587] [EXAMINATION OF DR. CURTIS VINCENT]

Q What was your job at Feliciana Forensic Facility when you were there?

A It varied some over the years that I was there. For a while I was acting chief psychologist whenever I was hired in 1979 until I hired someone to be the chief psychologist there. Once I hired someone for that position I became a clinical psychologist simply working there in that position. Through those years more than anything else I was doing psychological evaluations of individuals to help determine competency to stand trial, sanity, competency for other issues. I also did some treatment, individual and group. I put together and managed a program to treat some of the patients who were there.

* * *

[RECORD—P. 589] Q Dr. Vincent, you were appointed by the Court to evaluate Mr. Michael Owen Perry with reference to his competency to be executed, were you not?

A Yes, I was.

Q And as I understand your report you went to Angola and evaluated him on March 5th of 1988, is that correct?

A That's correct.

* * *

[RECORD—P. 590] He did indicate that he knew that he would be executed if he were found competent to proceed. * * * He was very tangential with me, that is, that as I asked him questions he would initially typically respond to that question very quickly, slight off the subject, and talked [RECORD—P. 591] about something completely irrelevant.

* * *

[RECORD—P. 592] Q Did Mr. Perry indicate to you that he was God?

A Yes, he indicated at least at one point that he was God.

Q What about his marital status?

A He told me that he had married a woman named Susan Bordelon since being at Angola and that he was—well, he told me that he had married her. I didn't go into any further detail after that.

* * *

Q What about auditory hallucinations?

A He told me at that point that indeed he was hearing voices in his head talking to him and telling him various things. [RECORD—P. 593] And I asked him in particular what those were and very often they were profanities. And at one point he blurted out that the voice was saying, this person is innocent. He also indicated to me that he had been having auditory hallucinations at the time of the offense.

* * *

A I also evaluated him in 1983 at Feliciana Forensic

* * *

Q I believe in 1983 your diagnosis was that of Schizoaffective Disorder. Has that changed?

A I believe that the diagnosis stands today, the same diagnosis.

* * *

[RECORD—P. 594] A I'm assuming he was taking medication at that point.

Q Okay.

A The security guard said that he indeed had been taking medication and that the night lieutenant said that he had observed him taking medication. From my many years working in a psychiatric facility there are ways to put it in your mouth and not take it. I don't know that he was indeed taking it at that point. * * * [RECORD—P. 599] There are times when an individual can be administered medication and he can put it in his mouth but not swallow it. * * *

Q Do crazy people and not crazy people both fain [sic] taking medication?

A Yes, they do.

* * *

[RECORD—P. 615] Q All Right, so, this psychological screening

your conclusion was a psychotic disorder characterized by high level of suspiciousness, coupled with a tenuous grip on reality. I mean . . .

A That's one of my conclusions.

* * *

[RECORD—P. 616] Q What treatment would you suggest?

A With the psychotic thinking that I see in him as of March, uh, I think medication would be the primary treatment modality to use.

* * *

[RECORD—P. 626] Q Is it correct to say that your conclusion was that he had an understanding of the functions of the court?

A One of my conclusions was that he indeed understood the functions—many of the functions of the court and he understood the rule[sic] of the various members of the court, yes.

* * *

[RECORD—P. 628] Q All right. But you also say that he does understand the charges and did understand the results of being found competent and he does understand the courtroom (inaudible) if we may use that terminology for the functions of the different parties, correct?

A Yes, that's correct.

* * *

[RECORD—P. 629] A As of March 5th, as I indicated, he was very inconsistent in a number of areas but in particular regarding his actions at the time of the murders and around that time. And that was very inconsistent. He was also very tangential, he had some difficulty paying attention and as a result I would see his having some difficulty assisting in his defense today, for instance.

* * *

[RECORD—P. 634] MR. NORDYKE: Dr. Estes.

THE COURT: Dr. Estes, you have been called as the next witness.

[RECORD—P. 637] [EXAMINATION OF DR. GLEN ESTES]

* * *

Q Dr. Estes, you were appointed to evaluate Michael Owen Perry, were you not?

A That's correct.

Q And of the three persons that have preceeded you on the witness stand I believe you examined him latest in time, on March 9th, 1988, is that correct?

A That's correct.

* * *

[RECORD—P. 641] A He did not tell me that he was married to Suzanne Bordelon, he told me that he was married at age seven, however.

* * *

[RECORD—P. 643] Q You indicated that you wished to be relieved of any responsibility for treatment of Mr. Perry.

A That's correct.

Q Besides not functioning in a prison setting except at the request and volunteering to do it for the judge, would you pursuant to his request volunteer to do it? That is, treat Mr. Perry.

A No, I would not volunteer to do that.

* * *

[RECORD—P. 644] Q * * * tell me can you treat a man to make him sane so he can be executed?

A Can I . . .

THE COURT: That's not the issue before me today, Mr. Salomon. I'm not going to make him answer the question. The inquiry today is competency to be executed. Let's go forward.

Q Doctor, do you have any moral or ethical dilemmas presented in a case of this nature?

MR. NORDYKE: Same objection, judge.

THE COURT: That's not his decision to make, that's my decision if we ultimately get there, Mr. Salomon.

* * *

[RECORD—P. 649] Q How many times did you meet with Mr. Perry?

A Once.

Q For what period of time?

A About an hour.

* * *

[RECORD—P. 660] THE COURT: Let the record show the defendant is in court with counsel and the State is represented by the Assistant Attorney General. I spoke briefly with defense counsel in the hallway outside the courtroom and I was advised that the defendant will be called as a witness. The court reporter will, of course, attempt to make as best a transcript as she possibly can but in the event that that is not possible I understand that the Defense, and I'll ask the State, if you have any objection to submitting the defendant's testimony on the video tape itself. Mr. Salomon, would you have any objection to that? We're going to probably make a transcript but what I'm saying is it may not be possible. I don't know if it is or not but whatever we get I'm going to submit the video tape also. Any comments or thoughts or objections you have on that?

MR. SALOMON: Yes, judge, I'm going to object just because I'm not sure that's within court rules and permitted by the State Supreme [RECORD—P. 661] Court. And that's going to be my basis.

THE COURT: Your objection is noted and overruled. As I've said, the court reporter will attempt to make as best a transcript as possible but in the even she's not able to do so the Court will submit it to higher courts in the form of this video cassette. So, with that, do you want to call Mr. Perry?

MR. NORDYKE: We will call Mr. Perry as an exhibit.

THE COURT: If you would step up, please.

MR. SALOMON: As an exhibit or as a witness?

THE COURT: He's being called as a witness. If you would raise your right hand and be placed under oath, please.

* * *

[RECORD—P. 663] [EXAMINATION OF MICHAEL PERRY]

Q * * * A minute ago you told me you were ninety percent. What is that?

A Well, like I told the judge, and I didn't mean it, but I was struck by the voices, you know. * * * [RECORD—P. 667] Now the truth is is that the voices got me. I wanted to commit suicide the day before I committed five counts of murder. A lot of people saw me do that. A lot of kids learned that. One lady is dead. I want her alive. You said you'd do that. Now once those voices get you—I fought it for twenty years of solid pain. I said, no, I don't want to do that, that's begging. That's what they did to me, they begged me for ninety years. They took it. So I said, okay, I join. Then they killed me for twenty years. Ten years of that was pain, you know. So to answer your question, I didn't do it. But I know who did. But that's going to cost you twenty million dollars before I can answer your question

* * *

[RECORD—P. 670] Q When were you born, Michael?

A December 3rd, 1954.

Q And who were your parents?

A Chester Adam Perry.

Q And who was your mother?

A Eve, they said Eve. That's what I first heard. And they said—like I read the bible thirteen years, solid pain. Mr. Hymel was a witness to that, you know. I wish you would respect the man and give up, you know, let the man send me to Jackson and have all of that sex activity if that's what they want to do with me, finish it off, you know. Uh, Rene, I like you. I'm shocked to death that you become against me. Uh, I want to give you that but if you don't like it I'll double it. That's my life. I have the right to defend my life, you know. I didn't do it but I know who did. And but, you know, that's whenever it started on me, you know, that's whenever it started. That's between me and you, you know. You told me to say that last night. We met. I ain't going to lie about it, you know, because I'm in front of the microphone. That thing is a cobra. You can't fool me, you know. We spent twenty years together and you beat the hell out of me. That's a legal word to say. I don't know what happened to the camera but you said I'd be on camera but I don't—there it is right there. But anyway, uh, I mean I told you I'd tell you the truth, too, you know, because I like to have fun with you. Uh, I know [RECORD—P. 671] your wife. We met before. I don't know why she likes me, uh, she said ninety percent. I said a hundred per-

cent, you know. And so I'm guilty, you know, and I'll pay for it. And the world is going to double. But I was born December 3rd, 1954 and I'm nine percent crazy, that's the truth, that's forever. I'm nine percent crazy. And, uh, that medicine they put me on I'm going to have to file suit for ninety million years.

* * *

[RECORD—P. 691] THE COURT: The Court will take this matter under advisement. I will give Defense counsel * * * two weeks, to file any memorandum in support of your [RECORD—P. 692] position * * * You have until the 20th of May at 5:00 p.m. to file a response, Mr. Salomon, if you wish to do so. * * * I will rule on this case at 9:00 a.m., May 26th.

MR. SALOMON: And, Your Honor, uh, is there something special you wish to be addressed in this memoranda?

THE COURT: I think the issues that have been formed. I think all of you are familiar with the Perry case from the Supreme Court, the Ford versus Wainwright decision, the issue of—one issue raised by one of the witnesses today is whether or not the Court has the authority or whether or not a defendant has the right to refuse medication. That's an issue, also.

* * *

**EXCERPTS FROM PROCEEDINGS HELD
AUGUST 26, 1988**

[RECORD— P. 698]

THE COURT: * * * The first matter that the Court is going to address today is the defense objection to the Court considering these **[RECORD—P. 699]** weekly or monthly reports filed into the record of this case by the officials of the Department of Corrections. Those reports were filed at my request, or sent to this Court by my request. * * * **[RECORD—P. 700]** Next business before the Court is that the Court is, based on the weekly reports that I have received, I feel that there has probably been a change in the mental condition of the defendant, I am ordering Drs. Cox and Jimenez to re-examine the defendant relative to his competency as set up by the Louisiana Supreme Court in the original Michael Owen Perry decision. * * *

[RECORD—P. 701] THE COURT: We'll do this at 10:00 that morning, September the 30th at 10:00 a.m. And, of course, the defendant will be brought into court for the purposes of that hearing. Pending that hearing, pursuant to RS 15:830.1, the Court is ordering that the Department of Public Safety and Corrections provide treatment and medication to the defendant, as to be determined by the medical staff of the Department of Public Safety and Corrections.

* * *

**EXCERPTS FROM SANITY HEARING HELD
SEPTEMBER 30, 1988**

[RECORD—P. 712] THE COURT: * * * Dr. Jimenez is ill and will not be able to be here today, so we'll take her testimony at a later date. And at this **[RECORD—P. 713]** time, the Court will call Kovac as a witness. Step up, please.

* * *

[RECORD—P. 714] DR. KAY BRASIER KOVAC, called by the Court as a witness to testify herein, after being duly sworn, testified, as follows:

* * *

A My name is Kay Brasier Kovac, I'm currently employed at Louisiana State Penitentiary, Angola. I have been medical director there since October of 1985.

* * *

[RECORD—P. 722] THE COURT: Okay, I'll let Defense counsel question Dr. Kovac. Which one of you wants to question her?

MR. NORDYKE: I'll take it, Your Honor.

* * *

[RECORD—P. 724] Q And, in fact, Michael's affect and delusional status can vary from day to day, can it not?

A It depends on—just in my limited experience with Michael, it depends on whether he had taken his medication.

Q But it does vary from day to day?

A Well, just using this example—this week as an example it hasn't varied, you know, what I saw Monday was the same as I saw yesterday.

Q That's because you gave him—that's because he was given a shot of Haldol-D on September 3rd?

A That's correct, because he had his medication.

* * *

[RECORD—P. 731] Q And in your administrative managerial capacity, as a supervising physician at the Angola State Hospital, did you

see some correlation between the acceptance of medication and this behavior you described as being acutely psychotic?

[RECORD—P. 732] A When Michael has not taken his medication he's had—you know, gone into these episodes.

[RECORD—P. 735] THE COURT: Let the record show *** Dr. Cox has been called by the Court as a witness and has been placed under oath.

[RECORD—P. 747] THE COURT: * * * Gentlemen, as I've indicated, the only other person whose testimony I'd like to hear is that of Dr. Jimenez who is not here today, as I told you the reason why. And pursuant to the bench conference we have decided on October 21st at 10:00.

EXCERPTS FROM SANITY HEARING HELD OCTOBER 21, 1988

[RECORD—P. 761] [EXAMINATION OF DR. JIMENEZ] Q I have just two questions, in response: The mood, affect, speech and coherence that you found fairly appropriate on these two visits are solely the result of the Haldol-D, is that true?

A That's right, sir.

Q And in summary—and I don't want to put words in your mouth—but, in summary, isn't it correct to say that if Michael is given large amounts of Haldol-D, he can be, he can, on occasion, be appropriate? And, now, on—if he is not given Haldol-D, he is going to be crazy?

A That's accurate, in the sense that the dosage of the medication is being readjusted based on the mental status and behavior of the patient.

[RECORD—P. 763] BY THE COURT: Gentlemen, I have reviewed your various briefs that you've submitted throughout these proceedings, and I have reviewed 'em, I've done my own independent research and I am prepared to rule. Is there any further argument not included in your brief or memoranda that you want to state at this time, Mr. Nordyke?

MR. NORDYKE: Your Honor, I don't believe so. I think everything that we have stated is either objected to in written form or else argued.

What about you, Mr. Giarrusso?

MR. GIARRUSSO: Likewise, Your Honor.

And, Ms. Denlinger?

MS. DENLINGER: Yes, Sir.

[RECORD—P. 766] BY MR. NORDYKE: The only thing I would point out in rebuttal, Your Honor, is the doctor's testimony is clear, that all things were said to the doctor on the two occasions in September were the result of the Haldol-D; that squares the issue.

[RECORD—P. 794] [BY THE COURT]: So I am going to set an appeal return date, or a writ perfection date, thirty days from today. That date will be November the 22nd. Assignments of error to be filed by November 16th. Transcript to be filed by November 10th.

And the Court will stay the execution of the judgment entered today.

APPENDIX B
LOUISIANA CODE OF CRIMINAL PROCEDURE,
TITLE XXI, CHAPTER 1 "MENTAL INCAPACITY
TO PROCEED"

Art. 641. Mental incapacity to proceed defined

Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense.

Official Revision Comment

(a) The test of mental incapacity conforms with the prior law and is a test that has been almost universally adopted. It is a combination of the formula stated in Art. 267 of the 1928 Louisiana Code of Criminal Procedure and the clearly stated application of that principle in Sec. 4.04 of the A.L.I. Model Penal Code. The A.L.I. Comment states:

"More commonly however, the statute merely refers to 'insanity' or 'unsound mind' but, when that is so, the term has almost always been interpreted judicially to refer to a defendant's incapacity to understand the proceedings or to participate in his defense." The Comment further points out that in England also, "... the inquiry appears to be genuinely focused on the defendant's capacity to understand and to defend. See Royal Commission on Capital Punishment, Report (1953) par. 223."

(b) The effect of amnesia which renders the defendant unable to remember the crime or to account for his conduct or whereabouts on that occasion, is generally stated in *State v. Swails*, 223 La. 751, 66 So.2d 796 (1953). In *Swails*, where the defendant had pleaded insanity at the time of the crime as a defense, the Louisiana Supreme Court rejected the claim of amnesia as lack of capacity to stand trial; and Justice McCaleb briefly stated (66 So.2d at 800):

"This contention would be very forceful and persuasive were this a prosecution in which the accused was pleading not guilty for, in such case, his inability to inform his counsel of any

of the facts regarding his own movements in relation to the charges against him would materially affect him in his defense. But, here, appellant is pleading insanity at the time of the commission of the crimes—a special defense under our law. LSA-R.S. 14:14 and 15:261. His alleged amnesia as to the events occurring at, before and after the crimes were committed is not a factor which hampers his defense. On the contrary, the very fact that appellant does not remember anything concerning his alleged criminal acts may be of material aid to his counsel in their presentation of a case of insanity and his testimony, if he sees fit to take the stand, may have considerable weight with the jury.”

Alcoholic amnesia, consisting of the defendant's failure to recollect his behavior while under the influence of excessive alcoholic beverages is never a bar to trial, since it is not “a result of a mental disease or defect.” *State v. Palmer*, 232 La. 468, 94 So.2d 439 (1957).

Art. 642. How mental incapacity is raised; effect

The defendant's mental incapacity to proceed may be raised at any time by the defense, the district attorney, or the court. When the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution, except the institution of prosecution, until the defendant is found to have the mental capacity to proceed.

Official Revision Comment

(a) Although present incapacity to stand trial is ordinarily urged by the defense, it may be raised by the district attorney or on the court's own motion. It is in the interest of fair administration of justice that a defendant who lacks the capacity to understand the proceedings against him and to assist in his defense should not be brought to trial while that condition exists. Art. 267 of the 1928 Code of Criminal Procedure, as amended in 1932, similarly provided for appointment of a lunacy commission whenever “the court has reasonable ground to believe that the defendant . . . is insane or mentally defective to the extent that (he) is unable to understand the proceedings against him or to assist in his defense.” This provision was applied in *State v. Hebert*, 186 La. 308, 172 So. 167 (1937), to uphold the trial judge's appoint-

ment of a lunacy commission on the district attorney's suggestion that the defendant might be mentally unfit to proceed with the trial, and despite the fact that no plea of present insanity had been tendered by the defense.

(b) When the question of the defendant's mental capacity to proceed has been raised, all proceedings in the case are stayed until that issue is determined, thus making sure that no action prejudicial to the defendant will be taken until the defendant's capacity to understand the nature of the proceedings and to assist in his defense has been established. An exception is made as to *institution* of the criminal prosecution. This may sometimes be necessary in order to prevent the time limitations on the institution of the prosecution from running out while the proceedings against a mentally incapable defendant have been stayed. Only the time limitations *upon commencement of trial* are interrupted by insanity of the defendant. See Art. 579.

Art. 643. Order for mental examination

The court shall order a mental examination of the defendant when it has reasonable ground to doubt the defendant's mental capacity to proceed. Prior to the ordering of any such mental examination, the court shall appoint counsel to represent the defendant if he has not already retained counsel. *Amended by Acts 1975, No. 325, § 1.*

Official Revision Comment

(a) The ordering of a mental examination as to the defendant's present capacity to proceed rests in the sound discretion of the court. It is not enough that the defense has filed a motion urging the defense, but there must be sufficient evidence to raise a reasonable doubt as to such capacity. Art. 267 of the 1928 Code providing for the defense of present unfitness, has been similarly construed in *State v. Ridgway*, 178 La. 609, 152 So. 306 (1934); *State v. Neu*, 180 La. 545, 157 So. 105 (1934); *State v. Messer*, 194 La. 238, 193 So. 633 (1940); *State v. Washington*, 207 La. 849, 22 So.2d 193 (1945); *State v. Ledet*, 211 La. 769, 30 So.2d 830 (1947); *State v. Green*, 221 La. 713, 60 So.2d 208 (1952). If there is a substantial doubt as to the defendant's mental capacity it is an abuse of discretion for the trial judge to refuse to order a mental examination. See *State v. Allen*, 204 La. 513, 15 So.2d 870 (1943).

(b) The mental examination ordinarily will be limited to a determination of present mental capacity to proceed. It will not include a determination of the defendant's mental condition at the time of the crime, unless the defense of insanity at the time of the crime is urged and "becomes an issue in the cause." *State v. Chinn*, 229 La. 984, 87 So.2d 315 (1955), discussed in *The Work of the Louisiana Supreme Court for the 1955-1956 Term—Criminal Law and Procedure*, 17 La.L.Rev. 404, 411 (1957).

(c) A defendant whose mental capacity to proceed is in doubt may not be qualified to determine his need for legal assistance nor capable of procuring counsel; therefore, this article makes special provision for counsel, because the usual provisions for appointment of counsel at arraignment do not afford full protection of such a defendant's interests. As under former R.S. 15:271, enacted in 1964, this right to counsel is not limited to felony cases.

Art. 644. Appointment of sanity commission; examination of defendant

A. Within seven days after a mental examination is ordered, the court shall appoint a sanity commission to examine and report upon the mental condition of the defendant. The sanity commission shall consist of at least two and not more than three physicians who are licensed to practice medicine in Louisiana and have been in the actual practice of medicine for not less than three consecutive years immediately preceding the appointment. No more than one member of the commission shall be the coroner or any one of his deputies. The court may appoint, in lieu of one physician, a psychologist who is licensed to practice psychology in Louisiana and who has been engaged in the practice of clinical or counseling psychology for not less than three consecutive years immediately preceding the appointment.

B. The physicians appointed to make the examination shall have free access to the defendant at all reasonable times. The court shall subpoena witnesses to attend the examination at the request of the defendant, the commission, or any member thereof.

C. For the purpose of the mental examination, the court may order a defendant previously released on bail to appear for mental examinations and hearings in the same manner as other proceedings.

Amended by Acts 1975, No. 325, § 1; Acts 1987, No. 577, § 1.

Official Revision Comment

(a) Other than the minimal requirements that the members of the sanity commission must be regularly licensed physicians with three years' actual practice, the determination of the qualifications of the members is left in the sound discretion of the trial judge. It is contemplated that Louisiana courts will continue their practice of appointing a psychiatrist or psychiatrists when available, as under a similar discretionary provision of amended Art. 269 of the 1928 Code of Criminal Procedure. Similarly, the coroner will frequently be well qualified to serve as a member of the commission and may be appointed. It is logical to assume that the court will appoint the most competent physicians available—for the value and weight of the sanity commission's report will largely depend on the competency and prestige of its members.

(b) The type of examination and procedures to be followed will be determined by the sanity commission, subject to such general directions as the court may include in the order for examination. The Louisiana Supreme Court has recently affirmed the wisdom of flexible sanity commission procedures, stating: "There is nothing in the statute requiring that an accused be kept under constant observation for any fixed period of time, and the legislature has not therein attempted to dictate to these experts in the manner and method to be employed by them in conducting their examination, undoubtedly feeling, as do we, that they are eminently better qualified to know just exactly how to best carry out their duties in this respect as the particular facts of each case may warrant." *State v. Faciane*, 233 La. 1028, 1048, 99 So.2d 333, 340 (1957); *State v. Augustine*, 241 La. 761, 131 So.2d 56 (1961).

(c) Confinement of the defendant in custody for the purpose of the examination, the right of free access to the defendant at all reasonable times, and the power to procure compulsory attendance of witnesses are all necessary to enable the commission to make accurate and complete investigations.

Art. 645. Report of sanity commission

The report of the sanity commission shall be filed in triplicate with the presiding judge within thirty days after the date of the order of appointment. The time for filing may be extended by the court. The clerk shall make copies of the report available to the district attorney and to the defendant or his counsel without cost.

Official Revision Comment

(a) The A.L.I. Model Penal Code, Proposed Official Draft (1962), § 4.05(1), authorizes commitment for a period not exceeding sixty days or such longer period as the court determines to be necessary. Art. 269 of the 1928 Louisiana Code provided that the sanity commission should report within thirty days. This article is a compromise. It makes the normal period thirty days after the date of the order of appointment, but allows the court to extend the time for filing the commission's report when additional time is required for the examination.

(b) The requirement that the report be filed in triplicate and copies made available to the district attorney and the defendant, makes the report fully available to all interested parties. Art. 269 of the 1928 Louisiana Code of Criminal Procedure similarly required that the report be made in writing and be accessible to the district attorney and the attorney of the accused. The importance of accessibility of a written copy of the report is shown by *State v. Winfield*, 222 La. 157, 62 So.2d 258 (1952), discussed in *The Work of the Supreme Court for the 1952-1953 Term—Criminal Procedure*, 14 La.L.Rev. 231, 235 (1953). In *Winfield* the trial judge was held to have committed reversible error in determining the issue of present insanity on the basis of a telephone report of the findings of the lunacy commission, rather than waiting for the actual filing of a written report. The underlying basis of the *Winfield* decision clearly appeared in Justice Moise's statement that "The mandatory provisions of the statute—that *the written report of the commission shall be presented to the trial judge and shall be accessible to the district attorney and to the attorney for the accused*—were not followed." (Emphasis by the court.) *Id.* at 161, 62 So.2d at 259.

Art. 646. Examination by physician retained by defense or district attorney

The court order for a mental examination shall not deprive the defendant or the district attorney of the right to an independent mental examination by a physician of his choice, and such physician shall be permitted to have reasonable access to the defendant for the purposes of the examination.

Official Revision Comment

This article, following Art. 268 of the 1928 Louisiana Code, continues the right of the defense or of the district attorney, to have the defendant examined by physicians of their own choice. The Comment to a somewhat similar provision of the A.L.I. Model Penal Code, Proposed Official Draft (1962), § 4.07(2), states that it "clears up a disputed point in a small numbers of jurisdictions where the defendant may have to have the consent of the warden or some other official before a psychiatrist of his own choosing may examine a defendant who is in custody."

Art. 647. Determination of mental capacity to proceed

The issue of the defendant's mental capacity to proceed shall be determined by the court in a contradictory hearing. The report of the sanity commission is admissible in evidence at the hearing, and members of the sanity commission may be called as witnesses by the court, the defense, or the district attorney. Regardless of who calls them as witnesses, the members of the commission are subject to cross-examination by the defense, by the district attorney, and by the court. Other evidence pertaining to the defendant's mental capacity to proceed may be introduced at the hearing by the defense and by the district attorney.

Official Revision Comment

(a) This article adopts the rule of Art. 267 of the 1928 Louisiana Code, and of Sec. 4.06(1) of the A.L.I. Model Penal Code, Proposed Official Draft (1962), that the issue of the defendant's fitness to proceed shall be determined by the court. The A.L.I. Comment to Sec. 4.06(1) lists 11 states and the federal laws (18 U.S.C. § 4244), that exclude a jury trial on the issue of fitness to proceed. Accord: *State v. Ridgway*, 178 La. 606, 152 So. 306 (1934); *State v. Neu*, 180 La. 545, 157 So. 105 (1934); *State v.*

Hebert, 186 La. 308, 172 So. 167 (1937); *State v. Bessar*, 213 La. 299, 34 So.2d 785 (1948); *State v. Cook*, 215 La. 163, 39 So.2d 898 (1949).

(b) The requirement of a contradictory hearing follows the rule of Art. 267 of the 1928 Code of Criminal Procedure. *State v. Hebert*, 186 La. 308, 172 So.2d 167 (1937).

(c) The express provision that the report of the sanity commission is admissible in evidence at the hearing conforms with the A.L.I. Model Penal Code, § 4.06(1) (Tent. Draft No. 4, 1955). The Comment to that provision states that it "may be interpreted as creating or at least allowing for an exception to the hearsay rule in connection with receiving in evidence the report of the examining experts without requiring that they appear and testify, thus obviating the necessity for taking the testimony of these experts in every case in which a report is contested [citing Wis. Stats.]." Nevertheless, full provision is made for utilization of direct testimony of the commission members in explanation and support of their findings.

(d) The last sentence, authorizing the introduction of other evidence, follows through on the right of the defense and the district attorney to have the defendant examined by their own psychiatrist or other physician. The provisions for testimony at the hearing further point up the general proposition that the report is only prima facie evidence of the sanity commission's findings and conclusions. In *State v. Hebert*, 187 La. 318, 174 So. 369 (1937), the supreme Court considered the testimony of the court-appointed physicians and of other witnesses in concluding that the trial judge had erred in adopting the lunacy commission's report of present insanity. The commissioners' report, according to the supreme court, was not supported by their testimony or by the testimony of all witnesses as a whole.

Art. 648. Procedure after determination of mental capacity or incapacity

A. The criminal prosecution shall be resumed if the court determines that the defendant has the mental capacity to proceed. If the court determines that the defendant lacks mental capacity to proceed, the proceedings shall be suspended and the court shall commit the

defendant to the custody of the Department of Health and Human Resources or a private institution approved by the court for custody, care, and treatment as long as the lack of capacity continues. If the court determines that the defendant's mental capacity is likely to be restored within ninety days by outpatient care and treatment at an institution as defined by R.S. 28:2(28) while remaining in the custody of the criminal authorities, and if the person is not charged with a felony or a misdemeanor classified as an offense against the person and is considered by the court to be unlikely to commit crimes of violence, then the court may order outpatient care and treatment at any institution as defined by R.S. 28:2(28). Defendants committed to the custody of the Department of Health and Human Resources shall be given inpatient care and treatment at an institution as defined by R.S. 28:2(28); however, a person charged with a felony or a misdemeanor classified as an offense against the person and considered by the court to be likely to commit crimes of violence shall be maintained in custody at the forensic unit at Feliciana Forensic Facility.

B. (1) In no instance shall such custody, care, and treatment exceed the time of the maximum sentence the defendant could receive if convicted of the crime with which he is charged. At any time after commitment and on the recommendation of the superintendent of the institution that the defendant will not attain the capacity to proceed with his trial in the foreseeable future, the court shall, within a reasonable time and after at least ten days notice to the district attorney and defendant's counsel, conduct a contradictory hearing to determine whether the mentally defective defendant is, and will in the foreseeable future be, incapable of standing trial and whether he is a danger to himself or others.

(2) If, after the hearing, the court determines the defendant is, and will in the foreseeable future be, incapable of standing trial and may be released without danger to himself or others, the court shall release the defendant on probation. The probationer shall be under the supervision of the Department of Public Safety and Corrections, division of probation and parole, and subject to such conditions as may be imposed by the court.

(3) If, after the hearing, the court determines the mentally defective defendant incapable of standing trial, is a danger to himself or others, and is unlikely in the foreseeable future to be capable of standing

trial, the court shall order commitment to a designated and medically suitable treatment facility. Such a judgment shall constitute an order of civil commitment. However, the director of the institution designated for the patient's treatment shall, in writing, notify the court and the district attorney when the patient is to be discharged or conditionally discharged.

C. The superintendent of the forensic unit of the Feliciana Forensic Facility shall admit only those persons charged with a felony or a misdemeanor classified as an offense against the person and committed on recommendation of a sanity commission, persons charged with a felony or a misdemeanor classified as an offense against the person and found not guilty by reason of insanity, and persons transferred to the forensic unit from state correctional institutions. *Amended by Acts 1975, No. 325 § 1; Acts 1979, No. 318, § 1; Acts 1980, No. 612, § 1; Acts 1982, No. 495, § 1; Acts 1983, No. 399, § 1; Acts 1987, No. 928, § 1, eff. July 20, 1987; Acts 1988, No. 383, § 1.*

Official Revision Comment

(a) Committing a mentally incapacitated defendant to a state mental institution for as long as such incapacity continues is in conformity with the usual disposition of such cases. See Art. 267 of the 1928 Louisiana Code of Criminal Procedure.

(b) Appellate review of the court's determination of mental capacity to proceed or of the necessity of ordering a mental examination ~~will follow~~ the normal procedures. If the court improperly refuses to order a mental examination and appoint a sanity commission, the defendant's remedy is to reserve a bill of exceptions and urge this objection as a ground for a motion for a new trial which will be the basis of an ultimate appeal. *State v. Leon*, 177 La. 293, 148 So. 54 (1933). Likewise, the defendant can reserve a bill of exceptions to the court's determination of present mental capacity and have that question reviewed on appeal. *State v. Neu*, 180 La. 545, 157 So. 105 (1934).

The defendant has a right of direct appeal from a determination of present lack of capacity to stand trial when he would prefer an immediate trial rather than commitment to a mental institution. "(A)n appeal lies from such judgment [of present incapacity] because it is final in so far as the only issue involved

in such a proceedings is concerned and is prejudicial because it deprives the party of his liberty." *State v. Hebert*, 187 La. 318, 324, 174 So. 369, 371 (1937); *State v. Gunter*, 208 La. 694, 23 So.2d 305 (1945). *State v. Yaun*, 237 La. 186, 110 So.2d 573 (1956), classified this type of ruling as an appealable final judgment.

The state's appellate remedy, as in the case of other adverse preliminary rulings, is necessarily by immediate appeal for it has no review after an acquittal. Although there are no supreme court decisions in point, a ruling that the defendant is presently incapable of standing trial is final determination of that issue, and the state's case might be seriously prejudiced by the resulting delay in bringing the defendant to trial. Such a determination does not relate to the basic issue of guilt or innocence; therefore the facts may be reviewed on appeal. *Op. Atty. Gen.*, 1942-44, p. 249; *State v. Hebert*, 187 La. 318, 174 So. 369 (1937).

(c) Great hardship may result in some cases, for example, the case of a defendant charged with a nonviolent offense who is committed for a long period pending a finding of present capacity to proceed. In such a situation probation is authorized upon a finding that the defendant is not being helped by continued custody in the mental institution and that he may be released without danger. The public is further protected by the requirement that the probation may be granted only on recommendation of the superintendent of the mental institution and by an order of the committing court. Probation procedures follow the applicable provisions of Art. 657. Conditions of the probation, to be imposed by the court, may include submission to treatment, abstinence from alcohol, special help by parents, or other appropriate requirements designed to aid in recovery and to fully protect the public.

Art. 648.1. Information required prior to admission

No superintendent of an institution shall admit a defendant found by the court to lack the mental capacity to proceed pursuant to Art. 648 unless he is furnished by the court the following information:

- (1) The name and address of the defendant's attorney.
- (2) The crime or crimes with which the defendant is charged and the date of such charge or charges.

(3) A copy of the report of the sanity commission.

(4) Any other pertinent information concerning the defendant's health which has come to the attention of the court such as injuries sustained at the time of arrest or injuries sustained following incarceration. *Added by Acts 1975, No. 325, § 2.*

Art. 649. Procedure when capacity regained

A. At any time after a defendant's commitment, if the superintendent of the mental institution reports to the committing court that the defendant presently has the mental capacity to proceed, the court shall hold a contradictory hearing within thirty days on that issue.

B. Prior to such a hearing, the court shall appoint counsel to represent the defendant if the defendant does not have counsel, and shall order a mental examination by a sanity commission appointed in conformity with Article 644. If the committing court does not hold a hearing within thirty days, the sheriff of the parish from which the defendant was committed shall appear at the institution within seven days thereafter and shall receive and hold the defendant in custody pending further orders of the committing court. If the sheriff fails to appear with a court order and accept custody of the defendant, the superintendent of the state mental institution or the director of the mental health unit shall notify the judicial administrator and the attorney general of such fact. Thereafter the Criminal Court Fund of the parish from which the defendant was committed shall pay to the general fund of the state the sum of one hundred dollars a day until the sheriff appears and accepts custody of the defendant for the court.

C. The district attorney or the defense may apply to the court to have the proceedings resumed, on the ground that the defendant presently has the mental capacity to proceed. Upon receipt of such application the court shall hold a contradictory hearing to determine if there is reasonable ground to believe that the defendant presently has the mental capacity to proceed. The court may direct the superintendent of the mental institution where the defendant is committed to make a report and recommendation prior to such hearing as to whether the defendant presently has capacity to proceed, or may order an independent mental examination by a sanity commission appointed in conformity with Article 644.

D. Reports as to present mental capacity to proceed shall be filed

in conformity with Article 645, and the court's determination of present mental capacity to proceed shall be made in conformity with the appropriate provisions of Articles 646 and 647.

E. If the court determines that the defendant has the mental capacity to proceed, the proceedings shall be promptly resumed. *Amended by Acts 1975, No. 325, § 1; Acts 1987, No. 928, § 1, eff. July 20, 1987; Acts 1988, No. 383, § 1.*

Official Revision Comment

(a) This article provides a procedure for a redetermination of the present capacity issues when it later appears that the defendant may be capable of proceeding with the trial. The subsequent hearing as to capacity may be instigated by a report by the superintendent of the mental institution to which the defendant was committed, or by an application made by the district attorney or the defense. Certain differences inherent in the two procedures necessitated the partially separate statement.

(b) Under the first paragraph, when the superintendent of the mental institution reports that the defendant presently has capacity to proceed, a contradictory hearing is mandatory. The hearing must be held within thirty days and the defendant must be represented by counsel at the hearing. The requirement of a prompt hearing is fortified by the second paragraph, which authorizes the superintendent of the mental institution to return the defendant to the parish from which he was committed if the hearing is not held within the prescribed thirty days.

(c) Under the third paragraph, when the district attorney or the defense applies to have the proceedings resumed, the court is required to hold a contradictory hearing only if there is reasonable ground to believe that the defendant presently has the mental capacity to proceed, *i.e.*, if there is a *prima facie* showing of present capacity.

(d) In both situations the ordering of an independent mental examination is discretionary with the court. When the superintendent of the mental institution reports that the defendant is capable of standing trial, the court may not feel that a further examination is necessary. When application is made by the district attorney or the defense, it is quite likely that the order for a men-

tal examination will be directed to the superintendent of the mental hospital where the defendant is committed. Such an examination and report will be a part of the services of that state institution, but the staff psychiatrist making the examination will be entitled to reasonable fees as an expert witness, and traveling expenses when he testifies at the hearing. Art. 660. Appointment of an independent sanity commission, in conformity with Art. 644 is also expressly authorized.

(e) Additional examinations by the defense and district attorney will be authorized under Art. 646. The court's determination of the question of regained capacity to stand trial is in accord with *State v. Laborde*, 210 La. 291, 26 So.2d 749 (1946), which held that the court was not limited to or bound by recommendations of the physicians.

Art. 649.1. Prescribed medication; administration

When a person is returned to the committing court from an institution pursuant to Article 649 pending a sanity hearing, and the superintendent of the committing institution deems it necessary that the patient receive prescribed medication, it shall be the duty of the chief administrative officer of the parish jail to make such medication available to the person until such time as the coroner or another physician finds that the medication or its prescribed dosage is no longer necessary. *Added by Acts 1975, No. 325, § 2.*

APPENDIX C

LOUISIANA REVISED STATUTES, TITLE 28, SECTIONS 2 AND 171

§ 2. Definitions

Whenever used in this Title, the masculine shall include the feminine, the singular shall include the plural, and the following definitions shall apply:

(1) "Conditional discharge" means the physical release of a judicially committed person from a treatment facility by the director or by the court. The patient may be required to report for out patient treatment as a condition of his release. The judicial commitment of such persons shall remain in effect for a period of up to one year and during this time the person may be hospitalized involuntarily for appropriate medical reasons upon court order.

(2) "Court" means any duly constituted district court or court having family or juvenile jurisdiction. "Court" does not include a city court, which shall have no jurisdiction to commit persons to mental health treatment facilities in civil or criminal proceedings, except when exercising juvenile jurisdiction.

(3) "Dangerous to others" means the condition of a person whose behavior or significant threats support a reasonable expectation that there is a substantial risk that he will inflict physical harm upon another person in the near future.

(4) "Dangerous to self" means the condition of a person whose behavior, significant threats or inaction supports a reasonable expectation that there is a substantial risk that he will inflict physical or severe emotional harm upon his own person.

(5) "Diagnosis" means the art and science of determining the presence of disease in an individual and distinguishing one disease from another.

(6) "Director" or "superintendent" means a person in charge of a treatment facility or his deputy.

(7) "Discharge" means the full or conditional release from a treatment facility of any person admitted or otherwise detained under this Chapter.

(8) "Department" means the Department of Health and Human Resources.

(9) "Formal voluntary admission" means the admission of a person suffering from mental illness or substance abuse desiring admission to a treatment facility for diagnosis and/or treatment of such condition who may be formally admitted upon his written request. Such persons may be detained following a request for discharge pursuant to R.S. 28:52.2.

(10) "Gravely disabled" means the condition of a person who is unable to provide for his own basic physical needs, such as essential food, clothing, medical care, and shelter, as a result of serious mental illness or substance abuse and is unable to survive safely in freedom or protect himself from serious harm; the term also includes incapacitation by alcohol, which means the condition of a person who, as a result of the use of alcohol, is unconscious or whose judgment is otherwise so impaired that he is incapable of realizing and making a rational decision with respect to his need for treatment.

(11) "Informal voluntary admission" means the admission of a person suffering from mental illness or substance abuse, desiring admission to a treatment facility for diagnosis and/or treatment of such condition who may be admitted upon his request without making formal application.

(12) "Major surgical procedure" means an invasive procedure of a serious nature with incision upon the body or parts thereof under general, local or spinal anesthesia, utilizing surgical instruments, for the purpose of diagnosis or treatment of a medical condition. Diagnostic procedures, including, but not limited to, the following, shall not be considered as major surgical procedures:

(a) Endoscopy through natural body openings, such as the mouth, anus, or urethra, to view the trachea, bronchi, esophagus, stomach, pancreas, small or large intestine, urethra, urinary bladder, or ureters, and to obtain from such organs specimens of fluids or tissues for chemical or microscopic analysis.

(b) Sub-cutaneous percutaneous liver biopsy.

(c) Punch biopsy of skeletal muscles.

(d) Bone marrow biopsy.

(e) Lumbar puncture.

(f) Myelogram.

(g) Thoracocentesis.

(h) Abdominocentesis.

(i) Conization of the uterine cervix.

(j) Renal angiography.

(k) Femoral angiography.

(l) Carotid angiography.

(m) Vertebral angiography.

(13) "Mental health advocacy service" means a service established by the state of Louisiana for the purpose of providing legal counsel and representation for mentally disabled persons and to insure that their legal rights are protected.

(14) "Mentally ill person" means any person with a psychiatric disorder which has substantial adverse effects on his ability to function and who requires care and treatment. It does not refer to a person suffering solely from mental retardation, epilepsy, alcoholism, or drug abuse.

(15) "Minor" means a person under eighteen years of age.

(16) "Parent" means a person who is the biological mother or father of an individual or the legally adoptive mother or father of an individual.

(17) "Patient" means any person detained and taken care of as a mentally ill person or person suffering from substance abuse.

(18) "Peace officer" means any sheriff, police officer, or other person deputized by proper authority to serve as a peace officer.

(19) "Person of legal age" means any person eighteen years of age or older.

(20) "Petition" means a written civil complaint filed by a person of legal age alleging that a person is mentally ill or suffering from substance abuse and requires judicial commitment to a treatment facility.

(21) "Physician" means a person permitted to practice and in active practice as a physician under the laws of Louisiana or a person in a post-graduate medical training program of an accredited medical

school in Louisiana or a medical officer similarly qualified by the government of the United States while in the state in the performance of his official duties.

(22) "Psychiatrist" means a physician who has at least three years of formal training or primary experience in the diagnosis and treatment of mental illness.

(23) "Respondent" means a person alleged to be mentally ill or suffering from substance abuse and for whom an application for commitment to a treatment facility has been filed.

(24) "Restraint" means the partial or total immobilization of any or all of the extremities or the torso by mechanical means.

(25) "Substance abuse" means the condition of a person who uses narcotic, stimulant, depressant, soporific, tranquilizing, or hallucinogenic drugs or alcohol to the extent that it renders the person dangerous to himself or others or renders the person gravely disabled.

(26) "Transfer" means the removal of a patient from one mental institution to another without any procedure for admission other than is prescribed by the department.

(27) "Treatment" means an active effort to accomplish an improvement in the mental condition or behavior of a patient or to prevent deterioration in his condition or behavior. Treatment includes, but is not limited to, hospitalization, partial hospitalization, outpatient services, examination, diagnosis, training, the use of pharmaceuticals, and other services provided for patients by a treatment facility.

(28) (a) "Treatment facility" means any public or private hospital, retreat, institution, mental health center, or facility licensed by the state of Louisiana in which any mentally ill person or person suffering from substance abuse is received or detained as a patient. The term includes Veterans Administration and public health hospitals and forensic facilities. "Treatment facility" includes, but is not limited to, the following, and shall be selected with consideration of first, medical suitability; second, least restriction of the person's liberty; third, nearness to the patient's usual residence; and fourth, financial or other status of the patient, except that such considerations shall not apply to forensic facilities:

- (i) Community mental health centers.

- (ii) Private clinics.
- (iii) Public or private halfway houses.
- (iv) Public or private nursing homes.
- (v) Public or private general hospitals.
- (vi) Public or private mental hospitals.
- (vii) Detoxification centers.
- (viii) Substance abuse clinics.
- (ix) Substance abuse in-patient facility.
- (x) Forensic facilities.

(b) Patients involuntarily hospitalized by emergency certificate for mental health treatment shall not be admitted to the facilities listed in Subparagraphs (ii), (iii), (iv), (viii), or (x) of this Paragraph, except that patients in custody of the Department of Public Safety and Corrections may be admitted to forensic facilities by emergency certificate provided that judicial commitment proceedings are initiated during the period of treatment at the forensic facility authorized by emergency certificate. Patients involuntarily hospitalized by emergency certificate for substance abuse treatment shall not be admitted to the facilities listed in Subparagraphs (ii), (iii), (iv), or (x) of this Paragraph. Judicial commitments, however, may be made to any of the above facilities except forensic facilities. However, in the case of any involuntary hospitalization as a result of such emergency certificate for substance abuse or in the case of any judicial commitment as the result of substance abuse, such commitment or hospitalization may be made to any of the above facilities, except forensic facilities, provided that such facility has a substance abuse in-patient operation maintained separate and apart from any mental health in-patient operation at such facility.

(c) "Treatment facility" shall not include a jail or prison of any kind, or any facility under the control or supervision of the Department of Public Safety and Corrections unless the facility has been designated by the Department of Health and Human Resources and the Department of Public Safety and Corrections as a treatment facility pursuant to R.S. 15:830.1(B); however, a jail or prison shall not be construed as a forensic facility. Only adult inmates sentenced to the Department of Public Safety and Corrections may be admitted to a treat-

ment facility designated pursuant to R.S. 15:830.1(B).

§ 171. Enumerations of rights; restrictions

A. No patient in a treatment facility pursuant to this Chapter shall be deprived of any rights, benefits, or privileges guaranteed by law, the Constitution of the state of Louisiana, or the Constitution of the United States solely because of his status as a patient in a treatment facility. These rights, benefits, and privileges include, but are not limited to, civil service status; the right to vote; the right to privacy; rights relating to the granting, renewal, forfeiture, or denial of a license or permit for which the patient is otherwise eligible; and the right to enter contractual relationships and to manage property.

B. No patient in a treatment facility shall be presumed incompetent, nor shall such person be held incompetent except as determined by a court of competent jurisdiction. This determination shall be separate from the judicial determination of whether the person is a proper subject for involuntary commitment.

C. The patient in a treatment facility shall be permitted unimpeded, private and uncensored communication with persons of his choice by mail, telephone, and visitation. These rights may be restricted by the director of the treatment facility if sufficient cause exists and is so documented in the patient's medical records. The patient's legal counsel, as well as his next of kin or responsible party must be notified in writing of any such restrictions and the reasons therefor. When the cause for any restriction ceases to exist, the patient's full rights shall be reinstated. A patient shall have the right to communicate in any manner in private with his attorney at all times.

The director of a treatment facility shall ensure that correspondence can be conveniently received and mailed, that telephones are reasonably accessible, and that space for visits is available. Writing materials, postage, and telephone usage funds shall be provided in reasonable amounts to recipients who are unable to procure such items.

Reasonable times and places for the use of telephones and for visits may be established in writing by the director of any treatment facility.

D. Restraint may be used only as a therapeutic measure or to prevent a patient from causing physical or mental harm to himself or oth-

ers. In no event shall restraint be utilized solely to punish or discipline a patient, nor is restraint to be used as a convenience for the staff of the treatment facility. A person placed in restraints shall have his status reviewed periodically.

E. Seclusion may be used only as a therapeutic measure or to prevent a patient from causing physical or mental harm to himself or others. In no event shall seclusion be utilized solely to punish or discipline a patient, nor is seclusion to be used as a convenience for the staff of the treatment facility. A person placed in seclusion shall have his status reviewed periodically.

F. No patient confined by emergency certificate, judicial commitment, or non contested status shall receive major surgical procedures or electroshock therapy without the written consent of a court of competent jurisdiction after a hearing.

If the director of the treatment facility, in consultation with two physicians, determines that the condition of such a patient is of such a critical nature that it may be life threatening unless major surgical procedures or electroshock therapy are administered, such emergency measures may be performed without the consent otherwise provided for in this Section. No physician shall be liable for a good faith determination that a medical emergency exists.

G. Every patient shall have the right to wear his own clothes; to keep and use his personal possessions, including toilet articles, unless determined by a physician that these are medically inappropriate and the reasons therefor are documented in his medical record. The patient shall also be allowed to spend a reasonable sum of his own money for canteen expenses and small purchases, and to have access to individual storage spaces for his private use. If the patient is financially unable to provide these articles for himself, the treatment facility shall provide a reasonable supply of clothing and toiletries.

H. Every patient shall have the right to be employed at a useful occupation depending upon his condition and available facilities.

I. Every patient shall have the right to sell the products of his personal skill and labor at the discretion of the director of the treatment facility and to keep or spend the proceeds thereof or to send them to his family.

J. Every patient shall have the right to be discharged from a treat-

ment facility when his condition has changed or improved to the extent that confinement and treatment at the treatment facility are no longer required. The director of the treatment facility shall have the authority to discharge a patient admitted by judicial commitment without the approval of the court which committed him to the treatment facility. The court shall be advised of any such discharge. The director shall not be legally responsible to any person for the subsequent acts or behavior of a patient discharged by him in good faith.

K. Every patient shall have the right to engage a private attorney. If a patient is indigent, he shall be provided an attorney by the mental health advocacy service, if he so requests. The attorneys provided by the mental health advocacy service or appointed by a court shall be interested in and qualified by training and/or experience in the field of mental health statutes and jurisprudence.

L. Every patient shall have the right to request an informal court hearing to be held at the discretion of the court within five days of the receipt of the request by the court. If the court determines that a hearing is appropriate and if the patient is not represented by an attorney of his own or from the mental health advocacy service, the court shall appoint an attorney to represent the patient. The purpose of the hearing shall be to determine whether or not the patient should be discharged from the treatment facility or transferred to a less restrictive and medically suitable treatment facility.

M. No provision hereof shall abridge or diminish the right of any patient to avail himself of the right of habeas corpus at any time.

N. Every patient shall have the right to be visited and examined at his own expense by a physician designated by him or a member of his family or an interested party. The physician may consult and confer with the medical staff of the treatment facility and have the benefit of all information contained in the patient's medical record.

O. Prefrontal lobotomy shall be prohibited as a treatment solely for mental or emotional illness.

P. No medication may be administered to a patient except upon the order of a physician. The physician is responsible for all medications which he has ordered and which are administered to a patient. A record of medications administered to each patient shall be kept in his medical record. Medication shall not be used for nonmedical reasons

such as punishment or for convenience of the staff.

Q. A person admitted to a treatment facility has the right to an individualized treatment plan and periodic review to determine his progress. The appropriate staff of the facility shall review the person's progress at least at intervals of thirty, ninety, one hundred eighty days and every one hundred eighty days thereafter. The staff shall enter into the person's medical record his response to medical treatment, his current mental status, and specific reasons why continued treatment is necessary in the current setting or whether a treatment facility is available which is medically suitable and less restrictive of the patient's liberty.

R. A person admitted to a treatment facility has the right to have available such treatment as is medically appropriate to his condition. Should the treatment facility be unable to provide an active and appropriate medical treatment program, the patient shall be discharged.

APPENDIX D
LOUISIANA REVISED STATUTES, TITLE 15,
SECTION 830.1

§ 830.1. Refusal of treatment by mentally ill or mentally retarded inmates

A. Whenever a mentally ill or mentally retarded inmate refuses treatment and any staff physician, staff psychiatrist, or consulting psychiatrist of the institution certifies that the treatment is necessary to prevent harm or injury to the inmate or to others, such treatment will be permitted for a period not to exceed fifteen days. If treatment for a longer period is deemed necessary, a petition shall be filed in a court of competent jurisdiction setting forth the reasons for the treatment. Treatment shall continue while the hearing is pending. After a hearing at which the mentally ill or mentally retarded inmate is represented by counsel, the court shall determine whether the inmate is competent and, if not, he shall order that appropriate treatment be provided. If the inmate does not have counsel, the court shall appoint an attorney to represent him. Reasonable attorney fees shall be fixed by the judge and paid by the state.

B. Treatment shall be administered at a treatment facility as designated by law, or at a facility under the control or supervision of the Department of Public Safety and Corrections that has been designated by the Department of Health and Human Resources and the Department of Public Safety and Corrections as a treatment facility.

C. Commitments pursuant to this Section shall be in accord with all procedures required by law in the case of judicial commitment. Nothing herein shall be construed to preclude any person in the custody of the Department of Public Safety and Corrections from any commitment or admission as may be otherwise provided by law.

APPENDIX E
STATE WHICH EXPRESSLY AUTHORIZES
MEDICATION TO ACHIEVE
COMPETENCY FOR EXECUTION

MARYLAND, Md. Code Ann. art. 27, § 75A (a) (2) (ii) (1987) states:
"An inmate is not incompetent merely because his or her competence
is dependent upon continuing treatment, including the use of medica-
tion."

APPENDIX F**STATES WHICH AUTHORIZE TREATMENT OR STAY
OR SUSPEND EXECUTION
UNTIL COMPETENCY IS REGAINED.**

ALABAMA, Ala. Code § 15-16-23 (1975) authorizes suspending the execution of a death row inmate until the incompetent inmate "is restored to sanity."

ARIZONA, Ariz. Rev. Stat. Ann. § 13-4023 (1978) authorizes a condemned inmate, upon being determined by a jury that he is insane, to be taken and confined in a state hospital "until his reason is restored." Ariz. Rev. Stat. Ann. § 13-4024 (1978) dissolves the suspension once the inmate "recovers his sanity."

ARKANSAS, Ark. Stat. Ann § 16-90-506 (1959) orders an incompetent death row inmate "confined in the state hospital until such time as he may recover his sanity."

CALIFORNIA, Cal. [Suspension of Execution] Code § 3703 (1971) and § 3704.5 (1988) order an incompetent death row inmate "taken to a medical facility of the Department of Corrections" and "there kept in safe confinement until his or her reason is restored," and § 3704 (1971) authorizes a new execution date once the defendant "has recovered his sanity."

COLORADO, Colo. Rev. Stat. § 16-8-110 (1986) provides that no person shall be "tried, sentenced or executed if he is incompetent to proceed at that stage of the proceedings against him"; Colo. Rev. Stat. § 16-8-111 (3) (1986) authorizes the inmate's execution for the same offense "after he has been found restored to competency"; Colo. Rev. Stat. § 16-8-112 (2) (1986) provides that the incompetent inmate shall be committed as provided in Colo. Rev. Stat. § 16-8-105 (4) (1986), which authorizes an incompetent defendant committed to a state facility for "care and psychiatric treatment"; Colo. Rev. Stat. § 16-8-114 (1986) provides for a restoration to competency hearing and authorizes the court to "enter any new order necessary to facilitate the defendant's restoration to mental competency"; Colo. Rev. Stat. § 16-8-114.5 excludes any evidence "resulting from a refusal by the defendant to accept treatment" from the court's consideration in reaching a determination as to "the substantial probability that the defendant will not be restored to competency within the foreseeable future."

CONNECTICUT, Conn. Gen. Stat. § 54-101 (1982) orders a stay of execution and the inmate "transferred to any state hospital for mental illness for confinement, support and treatment until he recovers his sanity" and once "such person has recovered his sanity...said penalty shall be inflicted."

FLORIDA, Fla. Stat. § 922.07 (3) and (4) (1985) provide the governor with the authority to order the insane convict committed to a Department of Corrections mental health facility and "kept there until the facility administrator determines that he has been restored to sanity." Fla. Rule Crim. Pro. 3.811 (1987) provides that a person who "lacks the mental capacity to understand the fact of the impending execution and the reason for it shall not be executed." Rule Crim. Pro. 3.812 (1987) authorizes a hearing de novo on the inmate's competency for execution and allows the court under Rule 3.812 (c) (3) (1987) to "[e]nter such other orders as may be appropriate to effectuate a speedy and just resolution of the issues raised." Rule Crim. Pro. 3.212 (c) (2) (1989) allows the court to order treatment of an incarcerated prisoner once that inmate has been found incompetent to proceed at any "material stage of a criminal proceeding" under Rule Crim. Pro. 3.210 (1989). Rule 3.212 (3) (1989) allows the court to commit the defendant for treatment to "restore a defendant's competence to proceed" if the court finds "(i) [t]hat the defendant meets the criteria for commitment as set forth by statute; (ii) [t]hat there is a substantial probability that the mental illness or mental retardation causing the defendant's incompetence will respond to treatment and that the defendant will regain competency to proceed in the reasonably foreseeable future; (iii) [t]hat treatment appropriate for restoration of the defendant's competence to proceed is available; (iv) [t]hat no appropriate treatment alternative less restrictive than that involving commitment is available." Committee Note under Rule 3.211 (1989) explaining the 1988 amendment states that "appropriate treatment may include maintaining the defendant on psychotropic or other medication. See Rule 3.215." Rule 3.215 (1989) provides that "[a] defendant...shall not automatically be deemed incompetent to proceed simply because his satisfactory mental condition is dependent upon such [psychotropic] medication, nor shall he be prohibited from proceeding solely because he is being administered medication under medical supervision for a mental or emotional condition."

GEORGIA, Ga. Code Ann. § 17-10-60 (1988) provides that a person is "mentally incompetent to be executed" if that person "is presently unable to know why he or she is being punished and understand the nature of the punishment." Ga. Code Ann. § 17-10-61 (1988) provides that an incompetent person shall not be executed. Ga. Code Ann. § 17-10-62 (1988) provides that this article is the exclusive procedure for determining competency for execution. Ga. Code Ann. § 17-10-68 (e) (1988) provides that if mental incompetency for execution is proven, the "court shall enter an appropriate order with respect to any scheduled execution time period and shall enter such supplementary orders as necessary and proper." Ga. Code Ann. § 17-10-71 (1988) provides that if the convict "regains his or her mental competency" then any previously entered stay of execution is vacated.

IDAHO, Idaho Crim. Court Rule 38 provides only generally that any sentence of death shall be stayed "pending any appeal or review." The Idaho State Legislature repealed Idaho Code § 19-2709 through § 19-2712 regulating competency for execution in 1970. Two years later the State Legislature passed a general competency to proceed statute that includes competency to be punished. Idaho Code § 18-210 (1972) provides that "[n]o person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, sentenced or punished for the commission of an offense so long as such incapacity endures." Idaho Code § 66-335 (1981) regulates commitments of mentally ill convicts. Idaho Code § 19-2523 (1982) allows a court "to authorize treatment during the period of confinement...if, after the sentencing hearing, it concludes by clear and convincing evidence that: (a) [t]he defendant suffers from a severe and reliably diagnosable mental illness or defect resulting in the defendant's inability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law; (b) [w]ithout treatment, the immediate prognosis is for major distress resulting in serious mental or physical deterioration of the defendant; (c) [t]reatment is available for such illness or defect; (d) [t]he relative risks and benefits of treatment or nontreatment are such that a reasonable person would consent to treatment."

ILLINOIS, Ill. Rev. Stat. ch. 38, § 1005-2-3 (1985) provides that a person is "unfit to be executed if because of a mental condition he is unable to understand the nature and purpose of such sentence." Subsec-

tion (4) of that statute provides that "if the offender is found unfit to be executed, he shall be remanded to the custody of the Department of Corrections until he becomes fit to be executed."

KENTUCKY, Ky. Rev. Stat. § 431.240 (1980) provides that the execution of an insane prisoner shall be stayed "until the condemned is restored to sanity." The statute further authorizes the commissioner of corrections to "transfer the condemned person to the state forensic psychiatric facility operated by the corrections cabinet until such time as he is restored to sanity."

MARYLAND, Md. [Crimes and Punishments] Code Ann. art. 27, § 75A (1987) provides that an incompetent inmate is one "who, as a result of a mental disorder or mental retardation, lacks awareness: 1. [o]f the fact of his or her impending execution; and 2. [h]e or she is to be executed for the crime of murder." The execution of such an inmate is forever prohibited, and the incompetent is thereby sentenced to life imprisonment. However, the statute expressly defines "incompetence" as not including an inmate whose competency to be executed is achieved and maintained by medication. Md. Code Ann. art. 27, § 75A (a) (2) (ii) (1987) states: "An inmate is not incompetent merely because his or her competence is dependent upon continuing treatment, including the use of medication."

MISSISSIPPI, Miss. Code Ann. § 99-19-57 (1984) provides that if a convict under a sentence of death becomes insane, "the following shall be the exclusive procedural and substantive procedure....If it is found that the convict is insane...the court shall suspend the execution....The convict shall then be committed to the forensic unit....The order of commitment shall require...a written report be furnished to the court...stating whether there is a substantial probability that the convict will become sane...within the foreseeable future and whether progress is being made toward that goal." The statute further provides that the standard of incompetency for execution should be if the convict "does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court."

MISSOURI, Mo. Rev. Stat. § 552.060 (1989) provides that "[n]o person

condemned to death shall be executed if, as a result of mental disease or defect, he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out." The statute further directs the warden to "order a stay of execution." The insane prisoner is subject to transfer to a mental hospital, and later if he is "certified by the director as free of a mental disease or defect...the governor shall fix a new date for execution...." Mo. Rev. Stat. § 552.050 (1983) authorizes the inmate transferred "to a state mental hospital for custody, care and treatment" for up to 96 hours, after which time the mental health coordinator or head of the facility may file for involuntary detention and treatment. The statute further provides for involuntary treatment for an additional one year.

MONTANA, Mont. Code Ann. § 46-19-202 (1983) provides that if after judgment of death a defendant "lacks [mental] fitness" the execution is suspended and the court "shall commit him to the...state hospital...for so long as the lack of fitness endures...." Once "the defendant has regained fitness to proceed, the warden must be directed by the court to carry out the execution" unless the court determines that "so much time has elapsed since the commitment...that it would be unjust to proceed...."

NEBRASKA, Neb. Rev. Stat. § 29-2537 (1973) authorizes a court to suspend the execution of a convict who appears to be mentally incompetent "until further order. Such proceedings may be had at such times as the judge shall order until it is either determined that the convict is mentally competent or incurably mentally incompetent."

NEVADA, Nev. Rev. Stat. § 176.415 (1987) provides that the execution of the death penalty may be stayed pending the investigation into the sanity of the convicted inmate. Nev. Rev. Stat. § 176.455 (1977) suspends the execution of an insane inmate "until the convicted person becomes sane" and includes an order to the director of the department of prisons "to confine such person in a safe place of confinement until his reason is restored." The statute further provides that "[i]f the convicted person thereafter becomes sane...the judge...shall enter an order vacating the order staying the execution of the judgment."

NEW MEXICO, N.M. Stat. Ann. § 31-14-6 (1984) provides that once a defendant under judgment of death is found insane as provided in

N.M. Stat. Ann. § 31-14-4 (1953), the court must order that "he be taken to the state hospital for the insane, and there kept in safe confinement until his reason is restored." N.M. Stat. Ann. § 31-14-7 (1953) provides that a new execution date will be rescheduled "[w]hen the defendant recovers his reason."

NORTH CAROLINA, N.C. Gen. Stat. § 15A-1001 (a) (1973) provides that "[n]o person may be tried, convicted, sentenced or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as 'incapacity to proceed.'" N.C. Gen. Stat. § 15A-1002 (b) (2) (1989) provides that incapacity to proceed may be raised at any time and when the defendant's capacity is questioned, the court "may order the defendant to a State facility for the mentally ill for observation and treatment, not to exceed 60 days, necessary to determine the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1004 (1985) and N.C. Gen. Stat. § 15A-1006 (1973) require the court to return the defendant to trial "in the event that he subsequently becomes capable of proceeding." If incapacity continues in a felony case for 10 years, the court has authority under N.C. Gen. Stat. § 15A-1008 (1973) to dismiss the charges.

OHIO, Ohio Rev. Code Ann. § 2949.28 (1969) provides that "[e]xecution of the sentence [of an insane convict sentenced to death] shall be suspended pending completion of the inquiry." The comments to this statute cite the standard as "whether he has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate that awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence to convey such information to his attorney or the court." Ohio Rev. Code Ann. § 2949.29 (1969) provides that "[i]f it is found that the convict is insane, the judge shall suspend the execution until the warden or sheriff receives a warrant from the governor directing such execution." Ohio Rev. Code Ann. § 2949.30 (1963) states that "if he is subsequently restored" the warden or sheriff shall report such finding to the governor, "who, when convinced that the convict is of sound mind, shall issue a warrant appointing a time for his execution."

OKLAHOMA, Okla. Stat. tit. 22, § 1005 (1981) requires that once "there is good reason to believe" that a convicted death row inmate has become insane, a jury must be impaneled to consider the inmate's competency. If the jury returns a verdict of insanity, Okla. Stat. tit. 22, § 1007 (1981) requires the court to order the defendant "taken to one of the state hospitals for the insane and there kept for safe confinement until his reason is restored." Okla. Stat. tit. 22, § 1008 (1981) requires the governor to reissue a warrant for the inmate's execution once "the defendant recovers his reason."

SOUTH DAKOTA, S.D. Comp. Laws Ann. § 23A-27A-22 (1979) provides that when a prisoner under sentence of death appears to be mentally incompetent to proceed, the governor is required to establish a sanity commission. S.D. Comp. Laws Ann. § 23A-27A-24 (1979) provides that once the commission finds the defendant mentally incompetent to proceed, the governor "shall suspend execution...and may in his discretion order the defendant removed to the human services center, there to remain confined until he is no longer mentally ill." S.D. Comp. Laws Ann. § 23A-27A-25 (1979) provides that once "the defendant is no longer mentally incompetent to proceed...the defendant shall be forthwith returned and delivered to the custody of the warden..., there to be dealt with according to law." S.D. Comp. Ann. § 23A-27A-26 (1979) mandates that the governor must then issue a new warrant commanding the recovered inmate's execution unless the sentence has been commuted or pardoned.

UTAH, Utah Code Ann. § 77-19-8 (1988) provides that the judgment of death may be suspended in cases of suspected incompetency for execution. Utah Code Ann. § 77-19-13 (1988) provides that the condemned inmate shall be examined under the provisions of Chapter 15, Title 77. If it is found that the defendant is incompetent, "the court shall immediately...enter an order for commitment under chapter 15, Title 77." Utah Code Ann. § 77-15-1 (1980) provides that "[n]o person who is incompetent to proceed shall be tried or punished for a public offense." According to Utah Code Ann. § 77-15-3 (1980), the chapter applies to any person charged with a public offense or serving a sentence of imprisonment. Utah Code Ann. § 77-15-5 (1980) allows the court to commit the individual "to the Utah state hospital, or to another facility for an evaluation not to exceed a period of 30 days based on examination, observation or treatment...." Upon a finding of incompe-

tence, the "court shall order him committed to the Utah state hospital...until the court which has committed him...finds that he is competent to proceed."

WYOMING, Wyo. Stat. § 7-13-901 (1987) provides that a convict under sentence of death lacks the "requisite mental capacity" if he lacks "the ability to understand the nature of death penalty and the reasons it was imposed." Wyo. Stat. § 7-13-902 (1987) provides that the court "shall stay the execution" of an incompetent death row inmate and order an examination. Subsection (f) of the statute provides that if the convict is found incompetent, the "judge shall suspend the execution...until a time when it is found that the convict has the requisite mental capacity."

APPENDIX G **FORMER DEATH PENALTY STATES** **WHICH STAYED OR SUSPENDED EXECUTION** **UNTIL COMPETENCY WAS REGAINED**

KANSAS, Kan. Stat. Ann. § 22-4006 (1978) provided that the execution of an insane inmate shall be suspended "until further order" and "such proceedings may be had at such times as the district judge shall order until it is either determined that such convict is sane or incurably insane."

MASSACHUSETTS, Mass. Gen. Laws Ann. ch. 279, § 47 (repealed, 1957) provided that once a convict under sentence of death became insane, he was granted "a respite from execution" and the governor was authorized to order his removal "to the hospital...for care and treatment." The respite continued "until it is determined as herein provided that the convict is no longer insane." Mass. Gen. Laws Ann. ch. 279, § 62 (1983), provided the governor with the authority to "respite the execution" of an insane inmate "until it appears...that the prisoner is no longer insane. Upon such respite, the governor may order the removal of such prisoner to the hospital...." The governor could "further respite the execution of the sentence from time to time for a stated period, until it is determined that the prisoner is no longer insane, as herein provided." This capital punishment legislation was held unconstitutional under Article 12, Declaration of Rights of the Massachusetts State Constitution.

NEW YORK, N.Y. [Correct.] Law art. 22-B § 655 (repealed 1970) provided that an inmate under a sentence of death, once found to be insane, could be ordered removed "to a state hospital for insane convicts, there to remain until restored to his right mind, and it shall be the duty of the director of such hospital, whenever, in his opinion, said convict is cured of his insanity, to report the fact to a justice of the supreme court...which justice shall...cause him, the said convict, to be returned to the custody [sic] of the superintendent of the state institution whence he came, there to be dealt with according to law." N.Y. [Correct.] Law art. 22-B § 657 mandated that the governor, once the defendant was "cured of his insanity" or underwent a "restoration to sanity," to issue a warrant for the inmate's execution. New York's

death penalty statute mandating capital punishment for murders committed by inmates serving a life imprisonment sentence was held unconstitutional in 1984. See *People v. Smith*, 468 N.E. 2d 879 (N.Y. 1984).

APPENDIX H
DEATH PENALTY STATES
WHICH INVOLUNTARILY TREAT
CRIMINAL DEFENDANTS IN OTHER CONTEXTS

DELAWARE, Del. Code Ann. tit. 11, § 403 (1974) authorizes the court to commit a defendant found not guilty by reason of insanity to the Delaware State Hospital, subject to the court's approval, modification and periodic judicial evaluation of any specific treatment program. Del. Code Ann. tit. 11, § 404 (1974) authorizes the court to "order the accused person to be confined and treated in the Delaware State Hospital until he is capable of standing trial." Del. Code Ann. tit. 11, § 405 (1974) allows the court to order a prisoner who has become mentally ill after conviction but before sentencing "to be confined and treated in the Delaware State Hospital until he is capable of participating in the sentencing proceedings." Del. Code Ann. tit. 11, § 406 (1974) authorizes the Superior Court, after it appears that a prisoner has become mentally ill after conviction and sentence to order the prisoner transferred and confined in the Delaware State Hospital. Del. Code Ann. tit. 11, § 408 commits a defendant found guilty but mentally ill to the Department of Corrections where he "shall undergo further evaluation and be given such immediate and temporary treatment as is psychiatrically indicated....[D]ecisions directly related to treatment for his mental illness shall be the joint responsibility of the Director of the Division of Alcoholism, Drug Abuse and Mental Health and those persons at the Delaware State Hospital who are directly responsible for such treatment." The statute further provides that "[t]he offender may, by written statement, refuse to take any drugs which are prescribed for treatment of his mental illness; except when such a refusal will endanger the life of the offender, or the lives or property of other persons with whom the offender has contact." Del. Code Ann. tit. 11, § 409 authorizes the court to require psychological or psychiatric counseling and treatment as a condition of parole or probation, and failure to continue such treatment, except as the Department of Corrections may agree, is a grounds to revoke such release. The statute further provides that treatment is a condition of probation for any defendant found guilty but mentally ill.

INDIANA, Ind. Code § 35-36-2-5 (1983) provides that a defendant found guilty but mentally ill "shall be further evaluated and then treated in such a manner as is psychiatrically indicated for his mental illness. Treatment may be provided by: (1) the department of corrections; or (2) the department of mental health after transfer...." The statute provides further that "if a defendant who is found guilty but mentally ill at the time of the crime is placed on probation, the court may...require that he undergo treatment." Ind. Code § 35-36-3-1 (1986) authorizes the court, once it finds that the defendant lacks the ability to stand trial, to commit the defendant "to the department of mental health, to be confined by the department in the appropriate psychiatric institution." Ind. Code § 35-36-3-2 (1981) requires the superintendent of the department of mental health to certify the fact that the defendant has regained his capacity to stand trial, and the court shall "hold the trial as if no delay or postponement had occurred."

LOUISIANA, La. R.S. 28:53 (1989) and 28:55 (I) (1978), authorize involuntary treatment of inmates judicially committed; La.C.Cr.P. art. 648 (1988), art. 654 (1982), art. 657 (1987), La. R.S. 15:574.4 H (11) (1989), and La. R.S. 15:830.1 (1987), authorize involuntary treatment of pre-trial detainees, defendants found not guilty by reason of insanity, individuals released on probation or parole, and incarcerated prisoners respectively.

NEW HAMPSHIRE, N.H. Rev. Stat. Ann. § 651:11-a (1987) allows the court to conditionally release a criminal defendant subject to court-ordered treatment. Subd. IV (a) of that statute provides such condition may include "but [is] not limited to, a prescribed regimen of medical, psychiatric, or psychological care or treatment" with the court retaining authority to modify or eliminate conditions imposed. The statute further provides that the criminal defendant "as an explicit condition of release" must "comply with the conditions imposed by the court, including any prescribed regimen of...psychiatric...treatment" or else be subject to arrest.

NEW JERSEY, N.J. Rev. Stat. Ann. § 2C:4-4 (a) (1979) provides that "[n]o person who lacks the capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures." N. J. Rev. Stat. Ann. § 2C:4-6 (1979) further provides that an incompetent defendant may be either committed or released on an

outpatient basis until it is determined "whether it is substantially probable that the defendant could regain his competence within the foreseeable future." Once fitness is regained, proceedings against the defendant resume. The statute also provides for the conditional release or parole of a defendant. Persons acquitted by reason of insanity may be conditionally released, committed or transferred "to a less restrictive setting for treatment" as provided in N.J. Rev. Stat. Ann. § 2C:4-8 (1981) and 2C:4-9 (1979). New Jersey law also provides for the involuntary treatment of convicted sex offenders. N.J. Rev. Stat. Ann. § 2C:47-3 (a) (1979) states: "If the examination reveals that the offender's conduct was characterized by a pattern of repetitive, compulsive behavior, the court may, upon the recommendation of the Adult Diagnostic and Treatment Center, sentence the offender to the Center for a program of specialized treatment for his mental condition...." The statute further provides in subdivision (c) that in lieu of incarceration the court may place the offender on probation with the condition that "he receive outpatient psychological treatment in a manner to be prescribed in each individual case." Because a significant number of inmates in state-owned or operated correctional facilities are mentally ill, New Jersey enacted N.J. Rev. Stat. Ann. § 30:4-82.1 (1986) requiring treatment of those inmates "either in the form of counseling or inpatient treatment during the period of their incarceration." Treatment under N.J. Rev. Stat. Ann. § 30:4-82.2 (1986) includes "treatment with prescription drugs." The statute requires a mental health treatment plan for each inmate including procedures to terminate the treatment when no longer necessary and a biennial review and revision of the plan.

OREGON, Or. Rev. Stat. § 426.490 (1979) states the policy and intent of the Oregon Legislative Assembly in that "the State of Oregon shall assist in improving the quality of life of chronically mentally ill persons within this state...." Or. Rev. Stat. § 426.670 (1979) provides authority to the state's mental health division, either separately or in conjunction with the state corrections division, "to receive, treat, study and retain in custody, as required, such sexually dangerous persons as are committed...." A sexually dangerous person is defined in Or. Rev. Stat. § 426.510 (1977) as "a person who because of repeated or compulsive acts of misconduct in sexual matters, or because of a mental disease or defect, is deemed likely to continue to perform such acts and be a danger to other persons." Or. Rev. Stat. § 426.675 (1979) authorizes the

court to order a convicted sex offender placed on probation "on the condition that the person participate in and successfully complete a treatment program for sexually dangerous persons" or to "impose a sentence of imprisonment with the order that the defendant...participate in a treatment program...." The statutory scheme presupposes that the treatment "will reduce the risk of future sexual offenses." Defendants found incompetent to proceed to trial under Or. Rev. Stat. § 161.370 (1975) may be committed "to the custody of the superintendent of a state mental hospital" or released "on supervision for so long as such unfitness shall endure." The statute authorizes the court to "place conditions which it deems appropriate on the release, including the requirement that the defendant regularly report to the Mental Health Division or a community mental health program for examination to determine if the defendant has regained his competency to stand trial." The statute further provides that proceedings will resume if capacity is achieved. Oregon has a Psychiatric Security Review Board created under Or. Rev. Stat. § 161.385 (1983) to supervise and require from the Mental Health Division a predischarge or preconditional release plan for those persons discharged or conditionally released to a state hospital for custody, care and treatment.

PENNSYLVANIA, Pa. Stat. Ann. tit. 50, § 7401 (1978) provides that "[w]hen a person who is charged with crime, or who is undergoing sentence, is or becomes severely mentally disabled, proceedings may be instituted for examination and treatment under the civil provisions of this act in the same manner as if he were not so charged or sentenced." Pa. Stat. Ann. tit. 50, § 7402 (1978) provides for the involuntary treatment of persons who are not severely mentally disabled but who were found incompetent to stand trial. The statute provides that the court may order involuntary treatment of such persons "not to exceed a specific period of 60 days" and "only if the court is reasonably certain that the involuntary treatment will provide the defendant with the capacity to stand trial. The court may order outpatient treatment, partial hospitalization or inpatient treatment." Subsection (d) of the statute authorizes the court to order a competency examination "at any stage in the proceedings." Pa. Stat. Ann. tit. 50, § 7403 (1978) provides that the proceedings shall be resumed if capacity to proceed is regained. Pa. Stat. Ann. tit. 50, § 7406 (1976) provides that an order directing involuntary treatment of a defendant found incompetent to stand trial, a defendant acquitted by reason of lack of responsibility, or

a defendant examined in aid of sentencing may be sought by the attorney for the commonwealth, the court, defense counsel, the defendant, the county administrator or any other interested party pursuant to Pa. Stat. Ann. tit. 50, § 7304 (1978). Subsections (b) and (c) of Pa. Stat. Ann. tit. 50, § 7304 (1978) outline the procedures for obtaining court-ordered involuntary treatment, requiring the petition to state there are "reasonable grounds to believe that the person is severely mentally disabled and in need of treatment." Subsection (a) requires proof of a "clear and present danger" proven by evidence of serious bodily harm to others, inability to care for himself, a danger of death or serious harm to himself, attempted suicide or self-mutilation. Pa. Stat. Ann. tit. 42, § 9727 (1982) provides that a defendant found guilty but mentally ill who is severely mentally disabled and in need of treatment be provided "such treatment as is psychiatrically or psychologically indicated for his mental illness." Subsection (d) of the statute further provides that before such a defendant is placed on prerelease or parole status, the court may require "[p]sychological and psychiatric counseling and treatment" as a condition of such status. The statute further provides that "[f]ailure to continue treatment, except by agreement of the supervising authority, shall be a basis for terminating prerelease status or instituting parole violation hearings." Subsection (f) of the statute further provides that the court may, either upon the district attorney's motion or the court's own initiative, "make treatment a condition of probation" for a guilty but mentally ill offender, and that "[f]ailure to continue treatment, including the refusal to take such drugs as may be prescribed, except by agreement of the sentencing court, shall be a basis for the institution of probation violation hearings."

SOUTH CAROLINA, S.C. Code Ann. § 44-23-430 (1977) permits the involuntary hospitalization of a defendant found incompetent to stand trial if he is "likely to become fit in the foreseeable future." If the defendant recovers, the court under S.C. Code Ann. § 44-23-460 (1977) has authority to order the criminal proceedings resumed. A person acquitted on grounds of insanity may be ordered hospitalized by the court pursuant to S.C. Code Ann. § 44-23-610 (1974). S.C. Code Ann. § 24-21-700 (1968) provides for commitment of prisoners who but for their psychiatric disabilities would be eligible for parole. The statute provides for the transfer of the prisoner "to a Veterans Administration Hospital which provides psychiatric care. When any prisoner paroled

for psychiatric treatment is determined to be in a suitable condition to be released, he shall not be returned to penal custody except for a subsequent violation of the conditions of his parole." S.C. Code Ann. § 17-24-70 (1988) provides that a defendant found guilty but mentally ill prior to incarceration "must first be taken to a facility designated by the Department of Corrections for treatment and retained there until in the opinion of the staff at that facility the defendant may safely be moved to the general population of the Department of Corrections to serve the remainder of his sentence." S.C. Code Ann. § 17-24-40 (1984) provides for the commitment of a defendant found not guilty by reason of insanity and permits the chief administrative judge under subsection (D) to impose any terms and conditions that are "therapeutic in nature, not punitive. Therapeutic terms shall include, but not be limited to, requirements that the defendant: (l) continue taking medication for an indefinite time and verify in writing the use of medication...."

TENNESSEE, Tenn. Code Ann. § 33-7-301 (1982) regulates the evaluation of a defendant believed incompetent to stand trial, and provides that "[i]f in the opinion of those performing the mental health evaluation, further evaluation and treatment is needed, the court may order the defendant hospitalized...for not more than thirty (30) days for the purpose of further evaluation and treatment as it relates to competency to stand trial." Subsection (b)(4) of the statute further provides that the "court shall determine...whether the defendant is substantially likely to injure himself or others if he is not treated in a forensic services unit and whether treatment is in his best interest" and subsection (b)(5) provides that upon such a finding, the defendant is transferred to the forensic services unit. Tenn. Code Ann. § 33-7-302 (1974) provides that the defendant must be delivered back to the sheriff once he "is restored to competence to stand trial." An offender found not guilty by reason of insanity may be ordered under Tenn. Code Ann. § 33-7-303 (1983) "to seek outpatient treatment and evaluation at a mental health facility, if the court determines that such treatment is required" or if the court finds that the offender is "substantially likely to injure himself or others if he is not treated in a forensic services unit...and treatment in such a unit is in his best interests."

TEXAS, Tex. Stat. Ann. art. 43.24 (1965) provides for treatment of the condemned, and provides that "[n]o torture, or ill treatment, or unnec-

essary pain, shall be inflicted upon a prisoner to be executed under the sentence of the law." Tex. Stat. Ann. art. 46.01 (1967) provides that a defendant found mentally ill after conviction "may be hospitalized under the same procedures provided for other persons who are mentally ill." Tex. Stat. Ann. art. 46.02 (1989) governs a defendant found incompetent to stand trial, with the requirement that the written examination report of the defendant include "recommended treatment." The statute further provides "[i]f the examiner concludes that the defendant is incompetent to stand trial, the report shall include the examiner's observations and findings about whether there is a substantial probability that the defendant will attain the competence to stand trial in the foreseeable future." The statute also requires the examiner to submit a separate report on "whether the defendant is mentally ill and is likely to cause serious harm to himself or others or will, if not treated, continue to suffer severe and abnormal mental, emotional or physical distress and will continue to experience deterioration of his ability to function independently and is unable to make a rational and informed decision as to whether or not to submit to treatment...." Subsection 5 (a) of the same statute requires the court, if the defendant is found incompetent to stand trial on a felony charge and there is the possibility that the defendant will become competent, "shall enter an order committing the defendant...not to exceed 18 months" and an additional order provides for "further examination and treatment toward the specific objective of attaining competency to stand trial." Once competency is regained, subsection 8 (e) provides that proceedings on the criminal charges may be resumed. Tex. Stat. Ann. art. 46.3 (1989) provides the court with authority to commit an acquitted person meeting the criteria for involuntary commitment and to order "the acquitted person to participate in a prescribed regimen of medical, psychiatric, or psychological care or treatment on an out-patient basis" or if inappropriate, returned to the in-patient or residential facility. Failure to comply is reason to revoke the out-patient supervision status.

VERMONT, Vt. Stat. Ann. tit. 18, § 7611 (1977) provides that "[n]o person may be made subject to involuntary treatment unless he is found to be a person in need of treatment or a patient in need of further treatment." Vt. Stat. Ann. tit. 18, § 7101 (1977) defines "[a] patient in need of further treatment" as "[a] person in need of treatment" or "[a] patient who is receiving adequate treatment, and who, if such treatment is discontinued, presents a substantial probability that in the near fu-

ture his condition will deteriorate and he will become a person in need of treatment"; "[a] person in need of treatment" is "a person who is suffering from mental illness and, as a result of that mental illness, his capacity to exercise self-control, judgment, or discretion in the conduct of his affairs and social relations is so lessened that he poses a danger of harm to himself or others." Vt. Stat. Ann. tit. 13, § 4820 (1987) requires a commitment hearing for a criminal defendant claiming insanity as a defense, found incompetent to stand trial, not indicted by a grand jury because of insanity or is acquitted by reason of insanity "for the purpose of determining whether such person should be committed to the custody of the commissioner of mental health." Vt. Stat. Ann. tit. 13, § 4822 (1987) provides that "[i]f the court finds that such person is a person in need of treatment or a patient in need of further treatment...the court shall issue an order of commitment...which shall admit the person to the care and custody of the department of mental health for an indeterminate period." Subsection (b) of the statute further provides that the defendant is subject to the provisions of Title 18 including Vt. Stat. Ann. tit. 18, § 7611 (1977).

VIRGINIA, Va. Code § 19.2-177.1 (1988) provides for a determination of mental illness after sentencing. The statute provides for the transfer of a prisoner who is "mentally ill and imminently dangerous to himself or others...and requires treatment in a hospital rather than a local correctional facility and the person having custody arranges for an evaluation of the prisoner by a person skilled in the diagnosis and treatment of mental illness." The statute further authorizes a judge or magistrate "upon the advice of a person skilled in diagnosis and treatment of mental illness" to issue "a temporary order of detention for treatment." The statute further provides in subsection (2) that "[i]n no event shall the prisoner have the right to make application for voluntary admission and treatment as may be otherwise provided" and that after hospitalization, the prisoner is returned to serve the remainder of his sentence, if any. Va. Code § 19.2-180 (1975) requires the trial and sentencing of a prisoner once he is "restored to sanity...as if no delay had occurred on account of his insanity or feeble-mindedness." Va. Code § 19.2-169.1 (1985) governs the procedures regarding a defendant who is believed to be incompetent to stand trial or enter a plea. The statute provides in subsection (D) that the competency report should include "his need for treatment in the event he is found incompetent." Subsection (E) of the statute further provides that "[n]or shall

the fact that the defendant is under the influence of medication bar a finding of competency if the defendant is able to understand the charges against him and assist in his defense while medicated." Va. Code § 19.2-169.3 (1982) regulates the disposition of the unrestorable incompetent defendant and provides "[i]f the court finds the defendant is incompetent but restorable to competency in the foreseeable future, it may order treatment continued until six months have elapsed."

WASHINGTON, Wash. Rev. Code § 10.77.050 (1974) provides that "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." Wash. Rev. Code § 10.77.020 (1974) provides that any court-ordered commitment or treatment of the criminally insane cannot exceed the maximum possible penal sentence for the crime charged. Wash. Rev. Code § 10.77.090 (1974) provides that once a defendant is found incompetent, all proceedings against him are stayed, and the court has authority to "commit the defendant to the custody of the secretary, who shall place such defendant in an appropriate facility of the department for evaluation and treatment...until he has regained competency necessary...but in no event, for no longer than a period of ninety days." Subsection (5) of the statute provides that "[a] defendant receiving medication for either physical or mental problems shall not be prohibited from standing trial, if the medication either enables him to understand the proceedings against him and to assist in his own defense, or does not disable him from so understanding and assisting in his own defense." Wash. Rev. Code § 10.77.110 (1974), § 10.77.120 (1974) and § 10.77.150 (1974) provide the court with authority to order treatment of criminal acquittees or conditional release of such persons "on such conditions as the court determines necessary."

APPENDIX I
NON-DEATH PENALTY JURISDICTIONS
WHICH INVOLUNTARILY TREAT
CRIMINAL DEFENDANTS IN OTHER CONTEXTS

ALASKA, Alaska Stat. § 12.47.050 (b) (1986) allows mandatory mental health treatment of defendant found guilty but mentally ill, with the Department of Corrections determining the course of treatment. Alaska Stat. § 12.47.055 (1984), allows the court to recommend or the Department of Corrections to provide "psychiatrically indicated treatment for a defendant who is not adjudged guilty but mentally ill." Alaska Stat. § 12.47.090 (1986) allows a defendant found not guilty by reason of insanity to be committed "for a period of time not to exceed the maximum term of imprisonment" for the crime charged or "until mental illness is cured or corrected." Alaska Stat. § 12.47.092 (1986) authorizes the conditional release of a defendant "subject to the conditions and requirements for treatment that the court may impose." Alaska Stat. § 12.47.110 (1982) authorizes a defendant found incompetent to be tried, convicted or sentenced to be committed to the custody of the commissioner of health and social services "for further evaluation and treatment until the defendant is mentally competent to stand trial, or until pending charges against the defendant are disposed of according to law."

DISTRICT OF COLUMBIA, D.C. Code Ann. § 24-301 (1973) authorizes a court finding "the accused to be then of unsound mind or mentally incompetent to stand trial or to participate in transfer proceedings" to be "confined to a hospital for the mentally ill." Furthermore, if the "accused person confined to a hospital for the mentally ill is restored to mental competency" a judicial determination of his competency to proceed will be made. D.C. Code Ann. § 24-301 further provides that a defendant acquitted on grounds of insanity is committed to a hospital for the mentally ill and once recovers, may be subject to unconditional release or conditionally released upon court supervision. "The court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital." D.C. Code Ann. § 24-302 (1973) provides that any person serving a sentence who becomes

mentally ill and is so certified by a psychiatrist, shall be transferred "to a hospital for the mentally ill to receive care and treatment during the continuance of his mental illness." D.C. Code Ann. § 24-303 (b) requires the superintendent of the hospital for the mentally ill to file a certification once the inmate has been "restored to mental health."

HAWAII, Hawaii Rev. Stat. § 706-607 (1972) provides that a court may involuntarily hospitalize a person "suffering from mental abnormality" after conviction in lieu of prosecution or sentencing. Hawaii Rev. Stat. § 704-403 (1972) provides that no person found incompetent to proceed shall be "tried, convicted or sentenced...as long as such incapacity endures." Once found incompetent, the court is authorized under Hawaii Rev. Stat. § 704-406 (1972) to suspend proceedings against the defendant and "commit him to the custody of the director of health to be placed in an appropriate institution for detention, care and treatment for so long as such unfitness shall endure." Once the defendant "has regained fitness to proceed," Hawaii Rev. Stat. § 704-406 (2) (1972) provides that "the penal proceeding shall be resumed." A defendant acquitted on the ground of physical or mental disease, disorder, or defect under Hawaii Rev. Stat. § 704-411 (a) (1983) may be committed to "the custody of the director of health to be placed in an appropriate institution for custody, care and treatment" if the defendant is a danger to himself, others or is "not a proper subject for conditional release." Subsection (b) of Hawaii Rev. Stat. § 704-411 (1983) further provides that such a defendant may be conditionally released if "he can be controlled adequately and given proper care, supervision and treatment." Hawaii Rev. Stat. § 704-413 (1983) mandates that the conditionally released defendant "shall continue to receive psychological or psychiatric treatment and care until discharged from conditional release. The person shall follow all prescribed treatments and take all prescribed medications according to the instructions of the person's treating mental health professional."

IOWA, Iowa Code § 812.4 (1983) provides that "if...the accused is found to be incapacitated...no further proceedings shall be taken...until the accused's capacity is restored." Iowa Code § 812.5 (1985) provides unless "there is substantial probability" that "the accused will regain capacity within a reasonable time" the state shall institute civil commitment proceedings. Iowa Code § 246.201 (1985) establishes the Iowa medical and classification center at Oakdale as "the forensic

hospital for persons displaying evidence of mental illness or psychosocial disorders and requiring diagnostic services or treatment in a security setting." Persons confined at the center include those found incompetent to stand trial and prisoners transferred for diagnosis, evaluation or treatment of mental illness. The statute further provides in subsection (5) that "[u]nless an inmate is determined to be mentally ill, the inmate shall not be subjected involuntarily to psychiatric treatment." Iowa Code § 246.503 (1985) requires that the transfer of mentally ill inmates be "in the best interests of the institution or inmates." Subsection (2) of this statute provides that "[w]hen the director has cause to believe that an inmate in a state correctional institution is mentally ill, the Iowa department of corrections may cause the inmate to be transferred to the Iowa medical and classification center for examination, diagnosis, or treatment. The inmate shall be confined at that institution or a state hospital for the mentally ill until the expiration of the inmate's sentence or until the inmate is pronounced in good mental health..." An inmate whose sentence has expired may as well be confined in the Iowa medical and classification center under subsection (3) of the statute if the director "has reason to believe" that the prisoner is mentally ill.

KANSAS, Kan. Stat. Ann. § 22-3303 (1977) provides that a defendant found incompetent to stand trial "shall be committed for evaluation and treatment to any appropriate state, county, or private institution for a period not to exceed ninety (90) days.... [T]he chief medical officer...shall certify...whether the defendant has a substantial probability of attaining competency to stand trial in the foreseeable future. If such probability does exist, the court shall order the defendant to remain in an appropriate...institution until the defendant attains competency to stand trial or for a period of six months..., whichever occurs first. If such probability does not exist..." involuntary commitment proceedings are commenced.

MAINE, Me. Rev. Stat. Ann. tit. 15, § 101-B (1987) provides that the court shall order a defendant "to be further examined by a psychiatrist and a clinical psychologist from the State Forensic Service if A. [i]t appears to the court, based on the report of any such examiner, that: (1) the defendant suffers or suffered from a mental disease or defect affecting his criminal responsibility or his competence for trial; or (2) [f]urther observation is required; or B. [t]he defendant enters or per-

sists in a plea of not criminally responsible by reason of insanity." Subsection (4) further provides that the court has the option to "[c]ommit the defendant to the custody of the Commissioner of Mental Health and Mental Retardation to be placed in an appropriate institution for the mentally ill or the mentally retarded for observation, care and treatment" which cannot exceed one year in duration. "If the court determines that the defendant is not competent to stand trial but there does exist a substantial probability that the defendant will be competent to stand trial in the foreseeable future, it shall recommit the defendant." Otherwise, civil commitment procedures are instituted. The statute further provides the court with authority to order the defendant released on bail "with or without the further order that the defendant undergo...treatment when it is deemed appropriate by the head of the hospital or clinic or by the private psychiatrist." Me. Rev. Stat. Ann. tit. 15, § 103 (1963) provides that a person acquitted by reason of mental disease or mental defect shall be "committed to the custody of the Commissioner of Mental Health and Corrections to be placed in the appropriate institution for the mentally ill or the mentally retarded for care and treatment." Me. Rev. Stat. Ann. tit. 15, § 104-A (1985) provides for court-ordered treatment as a condition for modified release treatment.

MASSACHUSETTS, Mass. Gen. Laws Ann. ch. 123, § 15 (1987) provides in subsection (d) that "[i]f the defendant is found incompetent to stand trial, trial of the case shall be stayed until such time as the defendant becomes competent to stand trial, unless the case is dismissed." Subsection (e) of the statute further authorizes that the court may "in its discretion commit the person to a facility or the Bridgewater state hospital" for up to six months if that person is found guilty on a criminal charge and prior to sentencing, the court orders psychiatric examination and observation. Court-ordered hospitalization and commitment with various time limits for defendants found incompetent to stand trial or not guilty by reason of mental illness are also authorized under Mass. Gen. Laws Ann. ch. 123, § 16 (1987). Once competency for trial is regained, the court-order commitment is terminated and the defendant is returned for trial. See Mass. Gen. Laws Ann. ch. 123, § 17 (a) (1987). Mass. Gen. Laws Ann. ch. 123, § 18 (1987) allows for the court-ordered transfer of prisoners in need of hospitalization by reason of mental illness and further provides "the prisoner shall be confined at said hospital if the findings required for commitment to a

facility are made and if the commissioner of corrections certifies to the court that confinement of the prisoner at said hospital is necessary to insure his continued retention in custody." Chemical restraints of mentally ill individuals in an emergency when a designated physician is not present is further authorized in Mass. Gen. Laws Ann. ch. 123, § 21 (1987) and may be "issued by a designated physician who has determined, after telephone consultation with a physician, registered nurse or certified physician assistant who is present at the time and site of the emergency and who has personally examined the patient, that such chemical restraint is the least restrictive, most appropriate alternative available; provided, however, that the medication so ordered has been previously authorized as part of the individual's current treatment plan."

MICHIGAN, Mich. Stat. Ann. § 330.2003 (c) (1979) provides that the department of mental health "shall provide psychiatric in-patient services for a prisoner...until it is determined by the director...that the prisoner can no longer benefit from treatment in the program." Mich. Stat. Ann. § 330.2003a (1975) provides that "[u]nless ordered by the probate court, a prisoner shall not be transferred to the center for forensic psychiatry program without having been informed of possible treatment methods and without having provided written consent to transfer and treatment." Mich. Stat. Ann. § 330.2003b (e) (1979) further provides that "[i]f a psychiatrist for the department of corrections determines that a prisoner is mentally ill or mentally retarded and that involuntary transfer to the department of mental health is warranted, the department of mental health shall select a psychiatrist to examine the prisoner. If the psychiatrist...concurs...that the prisoner is mentally ill or mentally retarded and requires intensive or specialized care or psychiatric inpatient services, a hearing shall be held...." Mich. Rev. Stat. Ann. § 330.2005d (1979) provides that (l) "[i]f the court finds that the prisoner is mentally ill or mentally retarded, the court shall enter a finding to that effect and shall order that the prisoner be transferred for treatment to the center for forensic psychiatry program." Mich. Rev. Stat. Ann. § 330.2020 (1975) provides that "a defendant shall not be determined incompetent to stand trial because psychotropic drugs or other medication have been or are being administered under proper medical direction, and even though without such medication the defendant might be incompetent to stand trial." Mich. Rev. Stat. Ann. § 330.2028 (1975) requires once a defendant is found incompetent to

stand trial, the center's report shall contain "the opinion of the center or other facility on the likelihood of the defendant attaining competence to stand trial, if provided a course of treatment...." Mich. Rev. Stat. Ann. § 330.2030 (1975) further provides in subsection (2) that "[i]f the defendant is determined incompetent to stand trial, the court shall also determine whether there is a substantial probability that the defendant, if provided a course of treatment, will attain competence to stand trial...." Subsection (4) of the statute further provides that "[i]f the defendant is receiving medication and is not determined incompetent to stand trial, the court may, in order to maintain the competence of the defendant to stand trial, make such orders as it deems appropriate for the continued administration of such medication pending and during trial." Mich. Rev. Stat. Ann. § 330.2032 (1975) provides that "(1) [i]f the defendant is determined incompetent to stand trial, and if the court determines that there is a substantial probability that, if provided a course of treatment, he will attain competency to stand trial..., the court shall order him to undergo treatment to render him competent to stand trial." Subsection (3) of that statute further authorizes the court to "commit the defendant to the custody of the department of mental health...only if commitment is necessary for the effective administration of the course of treatment." Court-ordered treatment is limited in Mich. Rev. Stat. Ann. § 330.2034 (1975) to no more than 15 months or one-third the maximum sentence the defendant could receive if convicted, whichever is lesser.

MINNESOTA, Minn. Stat. Ann. § 611.026 (1986) provides that "[n]o person shall be tried, sentenced or punished for any crime while mentally ill or mentally deficient so as to be incapable of understanding the proceedings or making a defense...." Minn. Stat. Ann. § 241.69, Subd. 1. (1987), mandates the establishment of a psychiatric unit at one of the adult correctional institutions for the "care and treatment of those inmates of state correctional institutions who become mentally ill." The statute further provides in Subd. 4. that "[i]f the examining physician or psychologist finds the person to be mentally ill and in need of long term care in a hospital, or if an inmate transferred [on the recommendation of an examining physician or psychologist in Subd. 3] refuses to voluntarily participate in the treatment program at the psychiatric unit, the chief executive officer of the institution or other person in charge shall initiate proceedings for judicial commitment....A person confined in a state correctional institution for adults who has been

adjudicated to be mentally ill and in need of treatment may be committed to the commissioner of corrections and placed in the psychiatric unit." Minn. Stat. Ann. § 241.67, Subd. 1. (2) (1989) authorizes the court to require treatment of convicted sex offenders as a condition of probation. As to persons believed to be incompetent to stand trial, Minn. Stat. Ann. § 253.25 (1985) authorizes the court to commit the defendant "for safe-keeping and treatment and such person shall be received and cared for thereat until he shall recover when he shall be returned to the court from which he was received there to be dealt with according to law." Furthermore, Minn. Stat. Ann. § 253.26 (1985) authorizes the transfer of patients who "have homicidal tendencies or to be under sentence or indictment or information" to the Minnesota Security Hospital "for safe-keeping and treatment." Minn. Stat. Ann. § 254.04 (1987) and § 254.09 (1986) allow for court-ordered treatment of inebriates and habitual narcotic users, respectively.

NEW YORK, N.Y. [Crim.Pro.] Law Ch. 11A, § 730.10 et. seq. (1976) governs mental disease or defect excluding fitness to proceed. The statutory scheme gives the court discretion to hospitalize a criminal defendant until a mental examination is completed. Furthermore, subsection 4 of the N.Y. [Crim.Pro.] Law Ch. 11A, § 730.20 (1972) provides that "[d]uring the period of hospital confinement, the physician in charge of the hospital may administer or cause to be administered to the defendant such emergency psychiatric, medical, or other therapeutic treatment as in his judgment should be administered." An incompetent defendant may be committed under N.Y. [Crim.Pro.] Law Ch. 11A, § 730.40 (1970) "for care and treatment in an appropriate institution for a period not to exceed ninety days." N.Y. [Crim.Pro.] Law Ch. 11A, § 730.50 (1974) authorizes criminal proceedings to resume once the defendant is certified as competent to proceed. Subsection 1 of the statute further provides that a defendant indicted for or convicted of a felony if incompetent is committed "for care and treatment in an appropriate institution for a period not to exceed one year."

NORTH DAKOTA, N.D. Cent. Code § 12.1-05-05 (1989) provides that "the use of force" by a person "with parental, custodial, or similar responsibilities" upon another person is justified. Furthermore, a person who is "a duly licensed physician, or a person acting at his direction, may use force in order to administer a recognized form of treatment to promote the physical or mental health of a patient if the treatment is

administered:...(c) [b]y order of a court of competent jurisdiction." N.D. Cent. Code § 12.1-04-04 (1973) provides that "[n]o person who, as a result of mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures." N.D. Cent. Code § 12.1-04-08 (1973) provides that proceedings against an incompetent defendant shall be suspended and "the court shall commit him to the custody of the superintendent of the state hospital or the state school. However, the defendant cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain fitness to proceed in the foreseeable future. Continued commitment of the defendant must be justified by progress toward fitness to proceed....When the court determines...that the defendant has regained fitness to proceed, the proceeding shall be resumed." N.D. Cent. Code § 12.1-04.1-21 (1985) provides that following a verdict of not guilty by reason of lack of criminal responsibility, the court "shall order the individual committed to a treatment facility...for examination." N.D. Cent. Code § 12.1-04.1-22 (4)(b) (1985) provides that if the court should find the acquittee "is mentally ill or defective and there is a substantial risk, as a result of mental illness or defect, that the individual will commit a criminal act of violence threatening another with bodily injury or inflicting property damage and that the individual is not a proper subject for conditional release, it shall order the individual committed to a treatment facility for custody and treatment. If the court finds that the risk that the individual will commit an act of violence...will be controlled adequately with supervision and treatment if the individual is conditionally released and that the necessary supervision and treatment are available, it shall order the person released subject to conditions it considers appropriate for the protection of society." Subsection (4)(c) of the statute provides that "[i]f the court finds that the individual is mentally ill or defective and that there is a substantial risk, as a result of mental illness or defect, that the individual will commit a criminal act not included in subdivision b, it shall order the individual to report to a treatment facility for noncustodial evaluation and treatment and to accept nonexperimental, generally accepted medical, psychiatric, or psychological treatment recommended by the treatment facility." N.D. Cent. Code § 12.1-04.1-24 (1985) provides the court with similar authority to require a mentally ill or defective per-

son with a substantial risk of committing a nonviolent criminal act to submit to "noncustodial evaluation and treatment."

RHODE ISLAND, R.I. Gen. Laws § 40.1-5.3-6 (1989) provides for the examination "of any person awaiting trial or convicted of a crime and imprisoned" if that person is believed to be "mentally ill and requires specialized mental health care and psychiatric in-patient services which cannot be provided in a correctional facility." The court under R.I. Gen. Laws § 40.1-5.3-7 (1989) may order the defendant's transfer and R.I. Gen. Laws § 40.1-5.3-9 (1989) requires the inmate's return to confinement once he has "sufficiently recovered." R.I. Gen. Laws § 40.1-5.3-13 (1989) provides the inmate with general rights to care and treatment but further provides that "[t]he exercise of these rights may be limited only for good cause and any limitation must be promptly entered into the person's record." Subsection (g) of the statute also indicates that "substituted judgment" is used for an incompetent individual. R.I. Gen. Laws § 40.1-5.3-1 (1982) establishes a state facility for the "proper care, treatment and restraint" of individuals found incompetent to stand trial and criminally insane persons. R.I. Gen. Laws § 40.1-5.3-3 (1984) provides the court with authority to commit a defendant found incompetent to stand trial "to the custody of the director for care and treatment in an appropriate public or private facility or to the care and custody of a guardian." The statute further provides that "[i]f the court finds that the defendant is incompetent and that a reasonable likelihood exists that he will become competent...it shall order continuation of the commitment...." R.I. Gen. Laws § 40.1-5.3-4 (1984) permits a court to commit a person acquitted on the ground of insanity and believed to be dangerous "for care and treatment as an inpatient in a public institution."

WEST VIRGINIA, W. Va. Code § 27-6A-2 (1979) provides that a defendant found incompetent to stand trial with a "substantial likelihood that the individual will attain competency" may be committed to a mental health facility "for an improvement period not to exceed six months." W. Va. Code § 28-5-31 (1980) provides for the treatment of mentally diseased inmates who are "deemed to be an appropriate candidate for parole, but for a condition warranting involuntary hospitalization." The statute further provides for the transfer of a mentally ill convict in a jail, prison or other facility who is in need of treatment. Before such a transfer, the statute requires a hearing and a court finding

that the inmate is mentally ill, mentally retarded or addicted, is likely to cause harm to himself or others, that requisite treatment or training is not available at the correctional center, and that the designated facility could provide such treatment "as the court finds appropriate."

WISCONSIN, Wis. Stat. § 971.13 (1982) provides an incompetent defendant may not be "tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." In subsection (2) the statute further provides that "[a] defendant shall not be determined incompetent to proceed solely because medication has been or is being administered to restore or maintain competency." Wis. Stat. § 971.14 (f) (1987) provides the defendant ordered to undergo a competency examination with a right to review "voluntary treatment appropriate to his or her medical needs. The defendant may refuse medication and treatment, except in a situation where the medication or treatment is necessary to prevent physical harm to the defendant or others." Subdivision (5) (a) of the statute further provides the court with authority to order an incompetent defendant committed for up to 18 months if the defendant is "likely to become competent...if provided with appropriate treatment." Subdivision (5) (d) further provides "[i]f the defendant is receiving medication, the court may make appropriate orders for the continued administration of the medication in order to maintain the competence of the defendant for the duration of the proceedings." Wis. Stat. § 971.17 (1970) gives the court authority to order a defendant found not guilty because of mental disease or defect "to be committed to the department to be placed in an appropriate institution for custody, care and treatment until discharged." Wis. Stat. § 51.20 (1) (ar) (1987) governs the involuntary commitment for treatment of inmates in a state prison. The statute requires the state to allege that the inmate "is mentally ill, is a proper subject for treatment and is in need of treatment." The petition must also contain evidence that "appropriate less restrictive forms of treatment have been attempted with the individual and have been unsuccessful and it shall include a description of the less restrictive forms of treatment that were attempted. The petition shall also allege that the individual has been fully informed about his or her treatment needs, the mental health services available to him or her and his or her rights with a licensed physician or a licensed psychologist." Subsection (7) (d) of the statute further provides that "[t]he court may order psychotropic medication as a temporary protective service...if it finds that there is probable cause to

believe the individual is not competent to refuse psychotropic medication and that the medication ordered will have therapeutic value and will not unreasonably impair the ability of the individual to prepare for and participate in subsequent legal proceedings. An individual is not competent to refuse psychotropic medication if, because of chronic mental illness, the individual is incapable of expressing an understanding of the advantages and disadvantages of accepting treatment, and the alternatives to accepting the particular treatment offered, after the advantages, disadvantages and alternatives have been explained to the individual." Subsection (8) of the statute further provides that "[t]he right to receive treatment voluntarily or accept treatment as a condition of release ...does not apply to an individual for whom a probable cause finding has been made...that he or she is not competent to refuse medication, to the extent that the treatment includes medication." Subsection (13) (a) (4m) (dm) further provides that "[i]f the court finds that the dangerousness of the subject individual is likely to be controlled with appropriate medication administered on an outpatient basis, the court may direct in its order of commitment that the county department...release the individual...with one of the conditions being that the individual shall take medication as prescribed by a physician, subject to the individual's right to refuse medication....The court order may direct that...if...the individual has failed to take the medication as prescribed...the director...may request that the individual be taken into custody...and that medication, as prescribed by the physician, may be administered voluntarily or against his will of the individual under s. 51.61(1) (g) and (h)." Wis. Stat. § 51.61 (1) (g) 1. (1987) provides mental health patients with the "right to refuse all medication and treatment except as ordered by the court under subd. 2, or in a situation in which medication or treatment is necessary to prevent serious physical harm to the patient or to others." Subdivision 2 further provides that "the court shall hold a hearing to determine whether there is probable cause to believe that the individual is not competent to refuse medication and whether the medication will have therapeutic value and will not unreasonably impair the ability of the individual to prepare for or participate in subsequent legal proceedings." If the court determines that such medication is appropriate and the individual is incompetent, "the court shall issue an order permitting medication to be administered to the individual regardless of his or her consent." Subdivision (6) of the statute further provides that

the county departments "have the right to use customary and usual treatment techniques and procedures in a reasonable and appropriate manner in the treatment of patients...for the purpose of ameliorating the conditions for which the patients were admitted to the system."

APPENDIX J

STATES WHICH STATUTORILY PROVIDE THAT COMPETENCY TO STAND TRIAL MAY BE ACHIEVED THROUGH TREATMENT

ALASKA, Alaska Stat. § 12.47.110 (d) (1982).

COLORADO, Colo. Rev. Stat. § 16-8-105 (1963) and § 16-8-114 (1963).

DELAWARE, Del. Code Ann. tit. 11, § 404 (1953).

FLORIDA, Fla. Rule of Crim. Pro. 3.215 (c) (1989), psychotropic medication permissible to achieve and maintain competency to proceed generally at any "material stage of a criminal proceeding..."

KANSAS, Kan. Stat. Ann. § 22-3303 (1977).

LOUISIANA, La.C.Cr.P. art. 648 (1988).

PENNSYLVANIA, Pa. Stat. Ann. tit. 50, § 7402 (1978).

MAINE, Me. Rev. Stat. Ann. tit. 15, § 101-B (4) (1987).

MICHIGAN, Mich. Rev. Stat. Ann. § 330.2020 (1975).

MINNESOTA, Minn. Stat. Ann. § 253.25 (1957).

NORTH CAROLINA, N.C. Gen. Stat. § 15A-1002 (b) (2) (1989).

NORTH DAKOTA, N.D. Cent. Code § 12.1-04-08 (1973).

RHODE ISLAND, R.I. Gen. Laws § 40.1-5.3-3 (1984).

TENNESSEE, Tenn. Code Ann. § 33-7-301 (1982).

TEXAS, Texas Stat. Ann. art. 46.02 (5) (a) (1989).

UTAH, Utah Code Ann. § 77-15-5 (1980).

VIRGINIA, Va. Code § 19.2-169.1 (E) (1985).

WASHINGTON, Wash. Rev. Code § 10.77.090 (5) (1974).

WEST VIRGINIA, W. Va. Code § 27-6A-2 (1979).

WISCONSIN, Wis. Stat. § 971.13 (2) (1982).